(26,286)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 819.

INSPIRATION CONSOLIDATED COPPER COMPANY, PLAINTIFF IN ERROR,

vs.

CEFERINO MENDEZ.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 10, 1918.

a In the Supreme Court of the State of Arizona.

Cause No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

vs.

CEFERINO MENDEZ, Appellee.

TRANSCRIPT OF RECORD.

Appearances:

For Appellant and Plaintiff in Error: Edward W. Rice.
For Appellee and Defendant in Error: A. C. McKillop, Geo. F. Senner.

1 In the Superior Court of Gila County, State of Arizona.

CEFERINO MENDEZ, Plaintiff,

vs.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Defendant.

Complaint.

Comes now Ceferino Mendez, the plaintiff in the above entitled cause, and complaining of the Inspiration Consolidated Copper Company, a corporation, the defendant in said cause, does allege:

1. That the plaintiff is a resident of Gila County, State of Arizona.

2. That the defendant is a corporation, organized under the laws of the State of Maine, duly incorporated and doing and transacting a mining business within Gila County, State of Arizona, and domiciliated therein.

3. That prior to and on the 28th day of July 1914, and at the time he received certain injuries hereinafter complained of, the said Ceferino Mendez was employed by and in the employment of the defendant; that the defendant is the owner of a mine in said Gila County; that in said mine on the said 28th day of July, 1914, the plaintiff was employed by the defendant; that on said day
2 while in said employment while engaged in his work for the defendant while acting within the scope of said employment and while acting under the said contract of employment as such employee of the defendant, the plaintiff received certain injuries in said mine; that said injuries were received while the defendant was working underground at manual labor in hazardous employment of

a miner in defendant's said mine; that the circumstances of said injuries were as follows:

That on the 28th day of July, 1914, the plaintiff while engaged about his duties in the employment of the defendant, as hereinbefore set out, was on what is ordinarily termed the 300½ level in the defendant's said mine; that blasts were set off on said level, filling said level with gases; that fresh air was supplied to said level through a pipe; that after said blasts it was necessary to turn on fresh air by means of opening a valve in said fresh air pipe; that plaintiff opened said valve for said purpose and when the plaintiff did so some foreign particles were blown into his eyes by the force of said air which has completely destroyed one eye and the sight thereof; that the sight of the other eye is endangered and is
3 impaired; that to turn on said air was a part of the defendant's duties; that since said accident that plaintiff has been unable to work at all; that at the time of said accident plaintiff was receiving Two Dollars and 75/100 a day for his work; that the age of the plaintiff is thirty-two years; that the sight of one eye has been totally destroyed; that the other eye will be permanently impaired; that the plaintiff has suffered great pain from the effects of said accident.

4. That said accident was due to a condition or conditions of plaintiff's said occupation while an employee in the service of the defendant; that said employment was a hazardous occupation; that said injury was not caused in whole or in part by the negligence of the plaintiff; that this action is brought under the Employers' Liability Law, Chapter 6, Title 14, Revised Statutes of Arizona of 1913.

5. That by reason of said injuries, the plaintiff has suffered damages in the sum of Three Hundred Fifty One Dollars and 80/100. arising from his inability to labor and earn wages from the said 28th day of July, 1914, to the institution of this suit; that the plaintiff has suffered great damages from said injuries due to
4 the permanent injury to his eyes and has also suffered great damages from said injuries due to the pain and suffering occasioned by said injury, all in the sum of Eight Thousand Dollars.

Wherefore, the plaintiff asks judgment against the defendant in the sum of Eight Thousand, Three Hundred Fifty One Dollars and 80/100 and for his costs in this cause incurred.

GEORGE F. SENNER,
A. C. McKILLOP,
Attorneys for Plaintiff.

Endorsement: Filed at 2:30 P. M., Nov. 9, 1914. J. W. Wentworth, Clerk.

(Title of Court and Cause.)

Answer.

Inspiration Consolidated Copper Company, a corporation, the defendant in the above entitled cause, answers the complaint of plaintiff herein as follows:

5 The defendant demurs to said complaint upon the ground that the same does not state facts sufficient to constitute a cause of action.

Said complaint fails to state facts sufficient to constitute a cause of action for the reason that there is no allegation in said complaint either of fact or conclusion, showing that the injury of the plaintiff complained of was caused in whole or in part, or was contributed to, by any negligence on the part of this defendant, or that this defendant was negligent in any respect whatsoever. Said action is brought under Chapter VI of Title 4 of the Revised Statutes of Arizona, 1913, being the Employers' Liability Law, and that said law imposes a liability without fault and is invalid because in conflict with Section 4 of Article II of the Constitution of the State of Arizona, and Article V and Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Wherefore this defendant prays that the plaintiff take nothing by his action and that the defendant have judgment for its costs.

EDWARD W. RICE,
Attorney for Defendant.

Endorsement: Filed at 2:30 P. M., Dec. 7, 1914. J. W. Wentworth, Clerk, by Elsie Patton, Deputy.

6 (Title of Court and Cause.)

First Amended Complaint.

Comes now Ceferino Mendez, the plaintiff in the above entitled cause, and complaining of the Inspiration Consolidated Copper Company, a corporation, the defendant in said cause, does
7 allege:

1. That the plaintiff is a resident of Gila County, State of Arizona.

2. That the defendant is a corporation, organized under the laws of the State of Maine, duly incorporated and doing and transacting a mining business within Gila County, State of Arizona, and domiciliated therein.

3. That prior to and on the 28th day of June, 1914, and at the time he received certain injuries hereinafter complained of, the said Ceferino Mendez was employed by and in the employment of the defendant; that the defendant is the owner of a mine in said Gila County; that in said mine on the said 28th day of June, 1914, the plaintiff was employed by the defendant; that on said day while in said employment while engaged in his work for the defendant while acting within the scope of said employment and while acting under the said contract of employment as such employee of the defendant, the plaintiff received certain injuries in said mine; that said injuries were received while the defendant was working underground at manual labor in the hazardous employment of a miner in defendant's said mine; that the circumstances of said injuries were as follows: That on the 28th day of June, 1914, the plaintiff while engaged

about his duties in the employment of the defendant, as
8 hereinbefore set out, was on what is ordinarily termed the 300 1-2 level in the defendant's said mine; that blasts were set off on said level, filling said level with gases; that fresh air was supplied to said level through a pipe; that after said blasts it was necessary to turn on fresh air by means of opening a valve in said fresh air pipe; that plaintiff opened said valve for said purpose and when the plaintiff did so some foreign particles were blown into his eyes by the force of said air which has completely destroyed one eye and the sight thereof; that the sight of the other eye is endangered and is impaired; that to turn on said air was a part of the defendant's duties; that since said accident the plaintiff has been unable to work at all; that at the time of said accident, plaintiff was receiving Three Dollars and 75-100 a day for his work; that the age of the plaintiff is thirty-two years; that the sight of one eye has been totally destroyed; that the other eye will be permanently impaired; that the plaintiff has suffered great pain from the effects of said accident.

4. That said accident was due to a condition or conditions of plaintiff's said occupation while an employee in the service of the defendant; that said employment was a hazardous occupation; that said injury was not caused in whole or in part by the negliegnce of the plaintiff; that this action is brought under the Employ-
9 ers' Liability Law, Chapter 6, Title 14, Revised Statutes of Arizona of 1913.

5. That by reason of said injuries, the plaintiff has suffered damages in the sum of Three Hundred Fifty One and 80-100 Dollars, arising from his inability to labor and earn wages from the said 28th day of June, 1914, to the institution of this suit; that the plaintiff has suffered great damages from said injuries due to the permanent injury to his eyes and has also suffered great damage from said injuries due to the pain and suffering occasioned by said injury, all in the sum of Eight Thousand Dollars.

Wherefore, the plaintiff asks judgment against the defendant in the sum of Eight Thousand, Three Hundred Fifty One and 80-100 Dollars and for his costs in this cause incurred.

A. C. McKILLOP.
GEO. F. SENNER.

Endorsed: "Filed March 20, 1915," at 3:35 P. M. J. W. Wentworth, Clerk, by Elsie Patton, Deputy.

(Title of Cause.)

Answer to Amended Complaint.

Comes now Inspiration Consolidated Copper Company, a corporation, the defendant in the above entitled action and files this its answer to the amended complaint of plaintiff herein.

10 I.

Defendant denies each and every, all and singular, the matters, allegations, and things in said amended complaint contained.

II.

For a further, separate, and independent defense defendant alleges that there is no allegation in said amended complaint which shows, or tends to show, that this defendant was negligent in any respect, or that the alleged injuries of plaintiff were caused by or due to any negligence or other wrongful act of this defendant; that the complaint herein is based upon, and said action is brought under Chapter VI of Title 14 of the Revised Statutes of Arizona of 1913, commonly known as and called the Employer's Liability Law; that said law is void and of no effect, for the reason that the same attempts to create a liability without fault; that said statute violates Section 4 of Article 2 of the Constitution of the State of Arizona, and Section 1 of Article 14 of the Amendments to the Constitution of the United States, in that, said Act, if enforced, would deprive this defendant of its property without due process of law and would deny to this defendant the equal protection of the laws; that for the reasons aforesaid the complaint herein does not state facts sufficient to constitute a cause of action.

11 III.

As a further, separate, and independent defense defendant alleges that if the plaintiff received the alleged, or any, injuries, as set forth in said complaint, or otherwise, or at all, said injuries were caused solely by the negligence and want of care of said plaintiff; that said plaintiff in opening the valve referred to in paragraph III of the complaint herein did not use ordinary, or any, care of his own safety, but so carelessly and negligently opened said valve as to cause the alleged injury to plaintiff's said eyes.

IV.

For a further, separate, and independent defense defendant alleges that if the plaintiff received the alleged, or any, injuries to his said eyes, as set forth in the complaint, or otherwise, or at all, said plaintiff did not for a long period of time immediately following said alleged accident and injury, use ordinary, or any, care in the treatment of said injuries; that said injuries, if any, were, when received, trivial, and the same could and would have been entirely cured by prompt and proper treatment; that plaintiff did not for a long period of time, to-wit, a period of more than three days, seek or secure medical, or any, attention for said alleged injuries; that by reason of the negligence and carelessness of plaintiff in
12 not caring for said injuries and in not obtaining promptly proper, or any, medical attention for said alleged injuries,

and as a direct result of his said negligence and delay, said injuries were aggravated and said eye became infected and was lost, if it was lost.

V.

For a further, separate, and independent defense the defendant alleges that the valve referred to in paragraph 3 of said complaint was a valve of the usual and ordinary type used in mining; that it was a simple appliance; that the plaintiff was entirely familiar with said valve and such type of valve, and with the operation thereof; that if plaintiff opened said valve as alleged in paragraph 3 of the complaint and foreign particles were thereupon blown into his eyes by the air escaping through said valve and thereby caused the alleged, or any, injury to plaintiff, such injuries were the result and were caused by the usual and ordinary risks and dangers of the work; that the risk and danger of injury therefrom were open and obvious, were apparent to and were fully observed, understood, and appreciated by the plaintiff, and that plaintiff assumed the risk of injury therefrom.

13 VI.

For a further, separate, and independent defense defendant alleges that the work which plaintiff alleges was being done by him at the time of said alleged injury was manual and mechanical labor in the mine of defendant; that said work was, and is within the purview of Chapter VII of Title 14 of the Revised Statutes of Arizona of 1913, commonly known as the Workmen's Compensation Act; that the plaintiff and defendant did not before the day of the alleged accident, or at any time, disaffirm an employment under the provisions of said Act by written contract; that neither the plaintiff nor the defendant before the day of said alleged accident, or at any time, by written notice from either to and served upon the other, or otherwise, disaffirmed an employment under the provisions of said Act; that on the day of said alleged accident, and at the time said alleged injuries were received, said Act was in full force and effect and governed and controlled the employment of plaintiff; that after said alleged accident and injury the plaintiff gave the defendant due notice thereof; that thereafter plaintiff demanded of defendant, and defendant paid to plaintiff, at various times, as provided in said Act, sums of money aggregating Two Hundred Sixty-two and 47-100 (262.47) Dollars; that said sums were equal to one-half of the wages which said plaintiff would have
14 earned during the period during which he was unemployed by reason of said alleged accident and injury, as provided in said Act; that said sums were demanded by plaintiff, were paid by defendant, and were accepted by plaintiff as payments under and in accordance with said Act; that by reason of the facts aforesaid the plaintiff has elected to abide by said Compensation Act and to settle any claim which he may have against this defendant by rea-

son of said accident and injuries under and in accordance with said Act; that this defendant has never refused to make any payment under said Act but that said plaintiff after receiving said sums of money as aforesaid refuses, and does now refuse, to accept further payments under said Act.

Wherefore this defendant prays that the plaintiff take nothing by his action, that the same be dismissed, and that defendant have judgment for its costs.

EDWARD W. RICE,
Attorney for Defendant.

Endorsed: "Filed March 23, 1915," at 9:50 A. M. J. W. Wentworth, Clerk, by Elsie Patton, Deputy.

15 Received a copy of the within answer this 23rd day of March, 1915.

A. C. McKILLOP,
GEO. F. SENNER,
Attorneys for Plaintiff.

(Title of Court and Cause.)

Minute Entries.

Be it remembered that heretofore and to-wit: On the 14th day of December, 1914, the same being one of the regular juridical days of said Court, the following order was made and entered, in said court, in said cause, which order is in figures and words, as follows, to-wit:

Order Continuing Hearing.

CEFERINO MENDEZ

vs.

INSPIRATION CONSOLIDATED COPPER COMPANY.

It is ordered that the hearing of the demurr- to the complaint herein be continued subject to call.

Be it remembered that heretofore and to-wit: On the 16th day of February, 1915, the same being one of the regular juridical days of said Court, the following order was made and entered, in
16-35 said Court, in said cause, which order is in figures and words as follows, to-wit:

Order Overruling Demurrer.

CEFERINO MENDEZ

vs.

INSPIRATION CONSOLIDATED COPPER COMPANY.

It is by the Court ordered that the demurrer herein be overruled.

* * * * * * *

36 Mr. Rice: If the Court please, I object to that. And I object to the introduction of any further testimony in this case for the reason that the complaint does not state facts sufficient to constitute a cause of action. And the reason of that is this is an action under the liability law which seeks to impose a liability without fault, and that law is unconstitutional, invalid and violates the XIV amendment to the United States Constitution for the
37–270 reason that it seeks to impose a liability without fault. The law in question being Chapter VI, Title XIV, R. S. 1913.

The Court: The objection is overruled.

Mr. Rice: I would like the record to show we take an exception.

* * * * * * *

271 (Title of Court and Cause.)

Instructions Requested by Defendant.

1. This action is brought under an Arizona statute commonly known as the Employer's Liability Law. This law makes the employer liable in damages for injuries to the employee where the employee is injured while working in the mines or in other employments designated in the law and declared to be especially dangerous and hazardous, where such injury is due to a condition or conditions of the occupation or employment and is not caused by the negligence of the employee injured. Except read in No. 9 herein.

You are instructed that the words "due to a condition or conditions" of the occupation of employment as used in this law, have reference solely to the risks and hazards which are inherent in such occupations because of their actual or supposed hazardous character, and that they do not include conditions which result from the failure of the employer to prescribe safe methods of doing the work or to furnish proper tools or appliances with which to do it.

In short, you are instructed that this law does not give a
272 couse of action for negligence of the employer, and that an injury caused by the neglect of the employer cannot be due

to a condition or conditions of the occupation or employment within the meaning of said law.

Given as framed. G. W. SHUTE, *Judge.*

2. If you find that the injury to the plaintiff, Mendez, was solely caused by neglect on the part of the defendant, your verdict must be for the defendant.

Given as modified. G. W. SHUTE, *Judge.*

3. Unless you find that the injuries to Mendez were due to a condition or conditions of his work, as these words are defined in a prior instruction, your verdict must be for the defendant.

Given.

G. W. SHUTE, *Judge.*

4. If you find that the valve which Mendez opened when he was injured was unusually stiff and that the injury was caused by the condition of the valve, your verdict must be for the defendant.

Refused.

G. W. SHUTE, *Judge.*

5. If you find that Mendez could, in the exercise of reasonable care for his own safety, have opened the valve without placing his eyes in such position as to receive the force of the air in his face, without so delaying his leaving the drift as to incur dan-
273–73*a* ger from the blasts, your verdict must be for the defendant.

Refused. G. W. SHUTE, *Judge.*

6. You are instructed that it was the duty of Mendez in opening the valve to use ordinary care for his own safety, and if you find that he did not use ordinary care in opening said valve to protect his eyes from the air and dust or dirt, and that his lack of such care wholly caused his injury, then your verdict must be for the defendant.

Given as modified.

7. You are instructed that an employee assumes the risk of injury from the usual and ordinary dangers of his work. If you find that Mendez received his injury as a result of the usual and ordinary dangers of his work, that the danger of injury therefrom was open and obvious to him, and that he knew, understood, and appreciated the danger of injury therefrom, then under the law he assumed the risk of injury and your verdict must be for the defendant.

Refused.

G. W. SHUTE, *Judge.*

* * * * * * *

273*b*–77 You are instructed to return a verdict in favor of the defendant.

Refused.

G. W. SHUTE, *Judge.*

You are instructed that the burden of proof is upon the plaintiff in this action and that unless the plaintiff has proven his cause of action by a preponderance of evidence, your verdict must be for the defendant.

Given.

G. W. SHUTE, *Judge.*

* * * * * * *

278–80 If you find that the injury to the plaintiff, Mendez, was solely caused by neglect on the part of the defendant, your verdict must be for the defendant.

* * * * * * *

281 (Title of Court and Cause.)

Verdict.

We, the Jury duly empaneled and sworn in the above entitled action, upon our oaths do find for the Plaintiff in the sum of Five thousand five hundred ($5,500.00) Dollars, Less Amt. paid to Plaintiff.

T. P. HOWARD, *Foreman.*

(Title of Court and Cause.)

Judgment.

This cause coming on regularly to be heard, the plaintiff appearing by his counsel, Geo. F. Senner, Esq., and A. C. McKillop, and the defendant appearing by its counsel, Edward W. Rice, Esq., and a jury of twelve persons having been regularly impaneled
282 and sworn; and the trial of said cause having been begun on the 23rd day of March, 1915, and having ended on the 25th day of March, 1915; and evidence having been introduced in behalf of the plaintiff and in behalf of the defendant; and all issues of fact having been submitted to the jury; and the jury having heard the evidence, the arguments of counsel, and instructions of the court, and having duly returned a verdict in favor of the plaintiff in the sum of Fifty Five Hundred ($5,500.00) Dollars less the amount previously paid the plaintiff by the defendant, the amount of which payment was not in issue but was agreed upon by both the plaintiff and the defendant and amounted to the sum of Two Hundred Sixty Two and 47-100 ($262.47) Dollars.

Now, therefore, it is ordered, adjudged, and decreed, That the plaintiff, Ceferino Mendez, do have and recover of the Inspiration Consolidated Copper Company, a corporation, defendant, the sum of Five Thousand, Two Hundred Thirty Seven and 53-100 ($5,237.53) Dollars, together with his costs in this cause incurred amounting to the sum of Thirty Six and 90-100 ($36.90) Dollars, together with interest on Five Thousand, Two Hundred Seventy Four and 43-100 ($5,274.43) Dollars, at the rate of six per
283 cent from the date of this judgment until paid.

Given under my hand this 29th day of March, 1915.

G. W. SHUTE,
Judge of the Superior Court.

Filed April 12, 1915.

Approved as to form.
EDWARD W. RICE,
Atty. for Dft.

(Title of Cause.)

Motion for New Trial.

Comes now Inspiration Consolidated Copper Company, a corporation, defendant in the above entitled action, and moves the court for an order vacating the judgment heretofore entered in said action and granting a new trial. This motion is based upon the following causes materially affecting the rights of this defendant:

1. Errors of law occurring at the trial of the cause.
2. Errors of law occurring during the progress of the cause.
3. That the verdict is not justified by the evidence.
4. That the verdict is contrary to law.

284–6 5. That the judgment is not justified by the evidence.
6. That the judgment is contrary to law.

7. That the court erred in admitting evidence offered by the plaintiff.
8. That the court erred in rejecting evidence offered by the defendant.
9. That the court erred in charging the jury.
10. That the court erred in refusing instructions asked by the defendant.

Dated at Globe, Arizona, this 6th day of April, 1915.

EDWARD W. RICE,
Attorney for said Defendant.

Filed April 7, 1915.

* * * * * * *

287 (Title of Cause.)

Notice of Appeal.

Notice is hereby given that the above named defendant, Inspiration Consolidated Copper Company, a corporation, appeals to the Supreme Court of the State of Arizona from the judgment rendered in said court in the above entitled cause on the 29th day of March, 1915, in favor of the above named plaintiff, Ceferino Mendez, and against the said Inspiration Consolidated Copper Company, a corporation, and from the whole thereof.

Dated this 27th day of September, 1915.

EDWARD W. RICE,
Attorney for Defendant.

Filed September 27, 1915.

288 *Assignment of Errors.*

1. The court erred in overruling defendant's demurrer to the complaint (abstract of record, folio 252) for the reason that the complaint fails to allege any negligence on the part of the defendant and is based solely on the Employer's Liability Law, which law attempts to impose a liability without fault and violates the Fourteenth Amendment to the Constitution of the United States in that it deprives the defendant of its property without due process of law and of the equal protection of the law. Said complaint, therefore, fails to state facts sufficient to constitute a cause of action.

2. The court erred in overruling defendant's objection to the introduction of any testimony in this cause (abstract of record, folio 36), which objection was based upon the ground that the complaint does not state a cause of action for the reason that the Lia-
289 bility Law under which the suit was brought was invalid and in violation of the Fourteenth Amendment to the United States Constitution.

3. The court erred in refusing to give the following instruction requested by defendant: "You are instructed to return a verdict in favor of the defendant." (Abstract, folio 209.) The requested instruction should have been given for two reasons: The Liability Law under which the suit was brought is void because in violation of the Fourteenth Amendment to the Constitution of the United States and hence the complaint did not state facts sufficient to constitute a cause of action, and plaintiff could not make out a case thereunder; and the evidence showed that plaintiff collected half-time under the Compensation Act, so that the latter Act furnished the sole measure of the rights and liabilities of the parties.

4. The court erred in refusing to give the following instruction requested by the defendant:

"You are instructed that an employee assumes the risk of injury from the usual and ordinary dangers of his work. If you find that Mendez received his injury as a result of the usual and ordi-

290 nary dangers of his work, and that the injury therefrom was open and obvious to him and that he knew, understood, and appreciated the danger of injury therefrom, then under the law he assumed the risk and your verdict must be for the defendant." (Abstract, folio 209.)

The foregoing instruction is correct in law and is applicable to the facts shown in evidence. Assumption of risk is a proper defense in actions under the Liability Law (Par. 3166 Revised Statutes of 1913) and must in all cases be left to the jury. (Par. 3166 Revised Statutes of 1913; Arizona Const., Sec. 5, Art. 18.)

5. The court erred in sustaining the plaintiff's objection to the question put to Dr. John E. Bacon (folios 204, 205) as to the condition of the eyes of the plaintiff when the latter entered the hospital on July 1, 1914. This testimony was material in that Doctor Bacon was the only witness before the court who could state of his own knowledge, from personal observation, the condition of plaintiff's eyes at that time. Other testimony had been given on behalf of plaintiff bearing upon that question. The right of plaintiff to object to this testimony as privileged, if he possessed such
291 privilege, was waived by his bringing suit, taking the stand and testifying fully and freely with reference to the injury and the subsequent condition of his eye, and by his testifying voluntarily as to his going to the hospital and his treatment there by the hospital staff and by Doctor Bacon personally, who was the head of that staff.

6. The court erred in denying defendant's motion for a new trial (folio 285) for the reasons specified in the foregoing assignments of error and for the following additional reasons: that the verdict and judgment are not supported by the evidence; and that the verdict is excessive. The evidence shows that plaintiff wholly caused his initial injury by his own negligence and want of ordinary care in opening the valve. It shows that his long delay in securing treatment for his injury seriously infected and aggravated the injury and caused the serious consequences of which he now complains. It shows that the plaintiff collected money under the Compensation Act and hence he cannot recover under the Liability Law. It also shows that the verdict is excessive.

292 Be it remembered that heretofor and to-wit on the 2nd day of July, 1917, the same being one of the regular juridical days of the Supreme Court of the State of Arizona, the following order and judgment was made and entered in said cause which is in figures and words as follows to-wit:

At this day it is ordered That the judgment of the lower court made and entered in this cause be and the same is hereby affirmed; Judge Ross dissenting.

It is further ordered, adjudged and decreed, That Ceferino Mendez, appellee herein, do have and recover of and from the Inspiration Consolidated Copper Company, a corporation, appellant herein, as principal, and United States Fidelity and Guaranty Company, a corporation, surety on supersedeas bond herein, the principal sum

of Five Thousand Two Hundred Thirty Seven and 53/100 ($5,237.53) Dollars, together with his costs in the lower court in this cause incurred taxed at Thirty Six and 91/100 ($36.91)
293 Dollars, with interest on all of said sums at the rate of six per cent per annum from the 29th day of March, 1915 until paid, together with his costs in this court in this cause incurred.

294 In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

vs.

CEFERINO MENDEZ, Appellee.

Opinion.

Appeal from a Judgment of the Superior Court of Gila County. G. W. Shute, Judge; Affirmed.

The appellee commmenced this action to recover damages for alleged injuries received by him on June 28th 1914 while occupied in the performance of his underground duties in the course of his employment by the appellant in appellant's mines. The injury suffered was inflicted at the time he opened a valve to admit compressed fresh air into a compartment of the mine to the end that the working be cleared of foul air, permitting the workmen there to proceed with their mining. When the said valve was opened by the appellee, the air escaping therefrom under heavy pressure struck appellee's face and cast dirt or other substances into his eyes causing injuries thereto. Negligence is not asserted as a cause of the
295 injuries, but plaintiff alleges that said accident was due to a condition or conditions of plaintiff's said occupation while an employee in the service of the defendant; that said employment was a hazardous occupation; that said injury was not caused in whole or in part by the negligence of the plaintiff; and, that this action is brought under the Employer's Liability Law, Chapter VI, Title 14, Revised Statutes of Arizona, Civil Code, 1913.

The defendant in defense to the action asserts that Chapter VI, Title 14 of the Civil Code of Arizona, 1913, upon which the action is based, is void for the reason that the same attempts to create a liability without fault and therefore would deprive this defendant as an employer of its property without due process of law, and would deny the equal protection of the laws, in violation of Section 4 Article VIII of the State Constitution, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and for these reasons the complaint fails to state facts sufficient to constitute a cause of action.

296 The further defenses of negligence by the plaintiff as the sole cause of the injury; the contributory negligence of the plaintiff in that he failed to timely and properly treat the injuries inflicted upon his eyes, which delay enhanced the damages thereto; the assumption of the risk by plaintiff, the defendant asserting that the injury resulted from an obvious and ordinary risk of the occupation; and, the defendant alleging that the plaintiff's remedy and defendant's liability if any are fixed by Chapter VII of Title 14, the Compensation Law, and not fixed by Chapter VI of Title 14 upon which the action is based.

The court disallowed all of defendant's objections to proceeding under the Employers' Liability Law, Chapter VI, Title 14, based on constitutional ground, and a trial of the cause resulted in a verdict for plaintiff in the sum of $5,500.00 less the amount, $262.47, concededly paid to plaintiff by the defendant. The court deducted said $262.47, the said amount paid to plaintiff from the said
297 amount found as damages, without objection, and rendered judgment for plaintiff for the sum of $5,237.53 and costs. From such judgment and from an order refusing a new trial, defendant appeals.

Mr. Edward W. Rice, of Globe, for Appellant.

Mr. A. C. McKillop, of Globe, and Mr. Geo. F. Senner, of Miami, for Appellee.

CUNNINGHAM, *J.*:

The appellee moves the dismissal of this appeal upon the ground that the appellant failed to take an appeal before filing an appeal bond.

The judgment in this case was ordered entered on the 29th day of March, 1915. The motion for a new trial was denied April 12, 1915. The appeal bond including a provision for superseding the execution of the judgment was filed on August 30th 1915. On September 27th 1915, the appellant gave its notice of appeal from the said order refusing a new trial and from said judgment. The appellee contends that because the bond was filed before the notice of appeal was given that at the time the bond was filed no appeal had been taken and that the bond was therefore prematurely filed and such filing of the bond does not serve any purpose of appeal.

An appeal may be taken from a final judgment of the
298 superior court in a civil action, at any time within six months after the rendition of the judgment; Paragraph 1233, Civil Code of Arizona, 1913. The appeal is taken by giving a notice of appeal, either in open court or in writing substantially in the form prescribed by Paragraph 1235, Civil Code, 1913, and the appeal is perfected when the notice of appeal has been given and the appeal bond, or affidavit in lieu thereof, has been filed within the time in which the appeal may be taken, that is within six months after the rendition of the final judgment. Paragraph 1236, Civil Code, 1913.

The appeal is perfected on the date when both the notice of appeal has been given and the appeal bond, or affidavit in lieu thereof, has been filed, or the date upon which the notice of appeal is given in cases in which no appeal bond is required. Paragraph 1237, Civil Code, 1913.

The performance of both of these acts within six months after the rendition of the judgment serves to effect a removal of the cause from the superior courts to the Supreme Court. The matter of the
299 removal of the cause from the lower to the higher court for review is the important purpose of the appeal. The order in which these necessary acts are to be performed so that the cause is effectually removed from the lower court to the higher, and by which the lower court is divested of jurisdiction over the cause, and the appellate court acquires jurisdiction over the cause, is not made important by the statute. The statute leaves the matter of the order of performing each of these necessary acts of removal to the pleasure of the party desiring to appeal, and only limits the time within which he must perform both acts necessary to the accomplishment of the appeal to the period of six months from the date of the rendition of the judgment. Wores v. Preston, 4 Ariz. 92, 77 Pac. 617, I think correctly decided the identical question here presented twenty four years ago, and that decision has remained the law to this day.

The appellee contends that the giving of the notice is the essential act of taking an appeal, and that the filing of a bond at a time prior to the time of giving of the notice of appeal is not equivalent in law to the filing of such bond after the appeal is taken, and
300 that the appeal must be first taken and thereafter the bond must be filed in order to effect an appeal. It is quite clear from the statutes that the giving of the notice of appeal is an act essential to taking an appeal. It is also quite clear from the statutes that the furnishing of an appeal bond, or affidavit in lieu of such bond, as the case may be, is essential to perfecting an appeal. The purpose of the statute requiring an appeal bond to be given is to protect the rights of the appellee pending the appeal. The parties may by written stipulation waive the giving of an appeal bond, and such waiver of the bond does not affect the appeal. Paragraph 1235, Civil Code, 1913.

The appellee had the right to object to the appeal bond on the grounds of its insufficiency for the reasons of any error, defect or insufficiency at any time within ten days after the filing of such bond, by giving notice of the errors, defects and insufficiencies in such bond of which he complains, and failing to give such notice all errors and defects or insufficiencies in any appeal bond are deemed
301 waived. Paragraph 1253, Civil Code, 1913.

Hence, the time of filing the appeal bond is important as fixing the time within which the appellee may object to errors, defects and insufficiencies therein.

Until the notice of appeal is given, the appellee's rights in the judgment are unaffected even though an appeal bond has been deposited by the appellant with the files in the cause. If appellee has knowledge that such bond has been deposited with the papers of the

cause, he is not required to object to the sufficiency of such bond until he is notified as required by law that the adverse party has taken an appeal. When the notice of appeal is given and the appeal bond is present in the cause, the adverse party then may object to the sufficiency of the appeal bond within the time provided, else he waives defects and the appeal is perfected and the jurisdiction over the cause is transferred. The presence of the appeal bond in the files of the court at the time the notice of the appeal is given,
302 is a sufficient filing of the appeal bond to require the adverse party, the appellee, to examine it for errors, defects and insufficiencies, and if any are found to then raise objections thereto. If no objections on the ground of defects, errors or insufficiencies are raised by the appellee within ten days thereafter, the bond is deemed effective as an appeal bond to accomplish a removal of the cause from the lower to the higher court. The obligors on the bond may not be heard to question their liability, and the appellee is furnished the protection pending appeal which the statutes are intended to give to him.

The appellee contends that in this case the bond filed is in form a supersedeas bond, and if an adverse party be permitted to file such a bond and thereby suspend the execution of a judgment before the appellee has notice of the taking of an appeal, the appellee suffers a wrong. This is assuming that a supersedeas bond filed before an appeal is taken has the effect of suspending a judgment from the time of the filing of the bond. Such is not the effect of the
303 depositing of such bond in the cause. The execution of the judgment may not be suspended by giving a supersedeas bond until an appeal is taken from the judgment. Paragraph 1243, Civil Code, 1913. In this case, however, on April 5th, 1915, the court ordered a stay of execution for sixty days, and on the first day of June, 1915, the court ordered the execution further stayed until the first day of September, 1915. The execution of the judgment in this cause was not suspended by the filing of the supersedeas bond on August 30th, 1915, from that date until September 27th 1915, when the notice of appeal was given, but the execution was stayed by the order of the court as a fact until September 1st, 1915. Whether the judgment was open to execution from September 1st to September 27th, 1915, is a matter not presented nor urged on this record. Certainly the fact that a bond in form was deposited with the papers in the cause purported to suspend the execution of the judgment did not have that effect until the appeal was taken. The mere fact
304 that the appeal bond was deposited with the papers in the cause at a time after the motion for a new trial has been denied, and prior to the time of giving notice of appeal, is no grounds for dismissing the appeal,—the bond and notice having been placed in the lower court within the time required for taking an appeal certainly perfected the appeal. The motion is therefore denied.

The principal question presented in this record and contest on this appeal is whether the Employers' Liability Law, Chapter VI, Title 14, Civil Code of Arizona, 1913, is constitutionally valid. The appellant

first challenged the validity of the statute by a general demurrer, which was overruled. It objected to the introduction of any testimony upon the same grounds. At the close of the evidence it requested a directed verdict in its favor, and in its motion for a new trial the same grounds were urged. The appellant states in its opening argument that:

"The first three assignments of error involve the single overshadowing question of the invalidity of the Liability Law and will be considered together."

305 The appellant contends, and I think his contention is correct, that the liability statute must be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer as such negligence is understood in the common-law of liability,—in other words: such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer. The cause was tried upon that theory, and the judgment must stand or fall according to the validity or invalidity of the said statute. The appellant makes the broad statement that "a statute creating such a liability cannot stand." At the threshold of the discussion we encounter the inquiry of the power of the legislature to enact liability laws which in effect modify the common-law of liability based

306 upon negligence or fault,—liability because of a failure on the part of the employer to perform a duty owing to the employee.

Chapter VI of Title 14, was enacted as a response to the mandate contained in Section 7 of Article XVIII of the State Constitution, reading as follows:

"To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employer's Liability law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

This provision is clearly one mandatory upon the legislative branch of the State Government as to all the requirements set forth in that provision for affirmative action by the legislature. The framers of the Constitution, and the people adopting the Constitution, by this section clearly set forth and made known to the legislative department,—the legislative branch of the State Government, that the public policy of this State and of the people of the

307 State is that employers of labor in hazardous occupations of all kinds of such industries shall be liable in damages to such employee as shall be injured when the injury is caused by any accident due to a condition or conditions of such occupations without re-

gard to negligence of the employer as the cause. The only limitation or restriction thrown about the legislature's duty in this respect is that in the enactment of employer's liability laws or other laws of such nature, no employer shall be made liable for the death or injury of any employee, when such death or injury shall bave been caused by the negligence of the employee killed or injured.

The form of our State government furnishes no means by which the legislature may be coerced into obeying such mandate so made its duty. The courts have no such power. This is certainly true.

Adams v. Howe, 14 Mass. 340, 7 Am. Dec. 216, 220:
Holbrook v. Holbrook, 1 Pick. 248:
308 In re opinion, 68 Me. 582:
School Board v. Patten et al., 62 Mo. 444:
Ex parte Alabama, 52 Ala. 231, 23 Am. Rep. 567, 573:
Sawyer v. Gilmore, 109 Me. 169, 83 Atl. 673:
In re State Census, 6 S. D. 540, 62 N. W. 129.

From these authorities and others that may be cited, and from the very nature of the matter, the legislative power of the State is not controlled nor controllable by simple mandatory directions given by means of constitutional provisions which direct action but do not restrict action on the part of the legislature. When the legislature is not constitutionally restricted, it may act or not as the occasion may seem proper, and in acting may pass any law the legislature deems for the welfare of the State unless prohibited by some positive constitutional provision, and all such laws not so prohibited are valid.

The provisions of the Constitution are all deemed mandatory, but that does not mean that the judicial branch of the State government has been confided with the power to enforce all mandatory provisions contained in the Constitution directed to the legislative and
309 executive branches of the State government of co-ordinate powers with the judicial branch. These matters are elementary and evident. So the constitutional mandate, supra, in no manner controls the legislature in the adoption by it of any provision of the Employer's Liability Law, unless it attempts to place liability upon an employer for the death or injury of an employee killed or injured by such employee's own negligence.

Appellant contends that the statute in question is in conflict with Section 1 of the Fourteenth Amendment to the United States Consitution prohibiting laws which deprive any person of property withoue due process of law, and that deny persons the equal protection of the laws, for the reason Chapter VI, Title 14, declares that an employer is liable for personal injuries suffered by an employee in the absence of any fault on the employer's part in causing such injury.

In Paragraph 3147 of Chapter VI of Title 14, Civil Code of Arizona, 1913, it is declared in no uncertain language that:

"Employment in all underground mines, underground workings, open cut workings, open put workings, in or about, and in connection with, the operation of smelters, reduction works, stamp mills,
310 concentration mills, chlorination processes, cyanide processes, cement works, rolling mills, rod mills, and at coke ovens and

blast furnaces, is hereby declared to be injurious to health and dangerous to life and limb."

Hence, laws enacted which reasonably regulate such employments are regulations within the police powers of the State.

Again, Paragraph 3156 of Chapter VI, Title 14, Civil Code of Arizona, 1913, places certain enumerated occupations within the police powers of regulation by the State, thus:

"3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows: * * *

(2.) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive. * * *

(8.) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters."

Paragraph 3155, id., contains the following declaration of public policy, towit:

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein."

311 Paragraph 3157, id., provides that:

"Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment."

Thereby the statute declares the occupations enumerated as inherently hazardous and dangerous to workmen engaged therein, and declares that which is evident to every observant person that the risks and hazards incident to such occupations are unavoidable by the workmen engaged therein. Such occupations designated as hazardous and dangerous, and inherently unsafe are deemed for that reason injurious to the health and dangerous to life and limb of the workmen engaged therein, and clearly fall within the police powers of the State for regulation and control. To the end that the workmen in said occupations may be protected in health, life and limb the law casts upon the employer the specific duty to promulgate rules, regulations and instructions by which all employees in such

312 occupations are informed as to their duties and restrictions of their employment. The safety of the employee engaged in the hazardous occupations is the dominant idea running through the statute. Paragraph 3158, Civil Code, sets forth the conditions which occurring, fix the employer's liability for personal injuries suffered by employees, towit:

"When in the course of work in any of the employments or occupations enumerated in the preceding section (Paragraph 3156), personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused t

COPY BOUND CL

or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative * * *."

The conditions occurring which create liability to respond in damages are: that the person injured must be in the service of the proprietor carrying on the hazardous industry; that the industry to be dangerous and hazardous must be one which fairly comes within one or more of the industries enumerated in Paragraph 3156;
313 that at the time the injury was suffered, the employee injured must be engaged in the performance of some duty of his employment; that the accident causing the injury suffered arose from the dangerous and hazardous nature of the service required in the industry as such is ordinarily carried on, and in carrying on such service necessary risks and dangers inherent therein are present as a menace to the workman without knowledge of which and without incurring the danger of injury therefrom he cannot perform such required service. In other words, this statute creates a liability of the master to damages suffered from any accident befalling his servant while engaged in the performance of duties in dangerous occupations without requiring the negligence of the master to be shown as an element of the right to recover; and it likewise takes away from the master his common-law right of defense of assumption of ordinary risk by the servant, and leaves to the master the right to defend upon the grounds that the servant assumed the ordinary risks other than risks inherent in the occupation. The statute clearly does not require as a condition of liability
314 that the accident causing the injury proximately resulted from the master's negligence, and it as clearly does exclude as a matter of defense the assumption of all ordinary and extraordinary risks inherent in the occupation. Such risks and dangers as are inherent in the occupation are declared to be unavoidable risks and dangers and therefore it necessarily follows that the employee in entering upon his duties does not assume such ordinary inherent risks although known to him. Such risks as he may assume must be risks and dangers other than risks and dangers inherent in the occupation. As was said by Justice Pitney in New York C. R. Co. v. White, U. S. Adv. Ops. 1916, page 247 (not yet officially reported):

"The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (*a*) That the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other per-
315 son for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; * * *

CLOSE IN CENTER

"In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that, under the present system, the injured workman is left to bear the greater part of industrial accident loss, which, because of his limited income, he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; * * *."

The statute under consideration in the White case is a compensation statute of the state of New York. The constitutional question involved in that case as shown by the foregoing statement of the matter, is the identical question raised in this case, viz.: the power of the State to create a liability against the employer
316 for accidental injuries to employees which occur without fault of the employer.

In discussing this question, the Court said, after stating the opposing contentions:

"In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. ed. 365, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet, as pointed out by the court of appeals in the Jensen Case (215 N. Y. 526), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer.

"The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is, of course, recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Hurtado v. California, 110 U. S. 516, 532, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; Second Employers' Liability cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 50, 56 L. ed. 327, 346, 38 L. R. A. (N. S.) 44, 32 Sup.
317 Ct. Rep. 169, 1 N. C. C. A. 875; Chicago & A. R. Co. v. Transbarger, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678. The common law bases the employer's liability f

injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 39, 43, 60 L. ed. 874, 877, 878, 36 Sup. Ct. Rep. 482."

The court then discusses the liability of the employer according to the maxim, respondeat superior; the employer's immunity from liability under the common-law doctrine of fellow servant, the general doctrine of assumption of risk, and the doctrine of contributory negligence, and says:

"But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow-servant rules and other common-law rules affecting the employer's liability for personal injuries to the employee. Missouri P. R. Co. v. Mackey, 127 U. S. 205, 208, 32 L. ed. 107, 108, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Minnesota Iron Co. v. Kline, 199 U. S. 593, 598, 60 L. ed. 322, 325, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 318 136; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 53, 54 L. ed. 921, 928, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676; Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 73, 51 L. ed. 708, 715, 27 Sup. Ct. Rep. 412; Missouri P. R. Co. v. Castle, 224 U. S. 541, 544, 56 L. ed. 875, 878, 32 Sup. Ct. Rep. 606. A corresponding power on the part of Congress, when legislating within its appropriate sphere, was sustained in Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. And see El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 97, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. D. 612, 619, 55 L. ed. 878, 883, 31 Sup. Ct. Rep. 621.

"It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. * * * it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it."

319 Discussing the particular features of the case at some length the Court then says:

"Much emphasis is laid upon the criticism that the act creates liability without fault. That is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 22, 41 L. ed. 611, 619, 17 Sup. Ct. Rep. 243; Chicago, R. I. & P. R. Co. v. Zernecke, 183 U. S. 582, 586, 46 L. ed. 339, 340, 22 Sup. Ct. Rep. 229.

"We have referred to the maxim, respondeat superior. In a well-known English case, Hall v. Smith, 2 Bing. 156, 160, 130 Eng. Reprint, 265, 9 J. B. Moore, 226, 2 L. J. C. P. 113, this maxim was said by Best, Ch. J., to be 'bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it.' * * * In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote,—the primary cause, as it may be deemed,—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as co-adventurers, with personal injury to the employee as a probable and foreseen result. * * * in our opinion, laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of
320 police regulations. Sherlock v. Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820; Missouri P. R. Co. v. Castle, 224 U. S. 541, 545, 56 L. ed. 875, 879, 32 Sup. Ct. Rep. 606."

Thus, from the court of ultimate authority over questions affecting constitutional guarantees and rights, we find answers to all of the arguments advanced by the appellant why Chapter VI of Title 14 is in conflict with the Fourteenth Amendment of the Constitution of the United States. I am of the opinion that the statute is free from the objections urged by appellant on the authority of such case.

It is undoubtedly true that our statute which limits the common-law rule of assumption of ordinary risks, to risks other than risks and hazards which are inherent in such occupations and which are unavoidable by the workman thereby contracts the scope of the employer's defense in such cases; but the defense of assumption of risks other than ordinary risks and hazards and risks and hazards which are not inherent in such occupations still remains open to him as before, and may be pleaded in defense as before, only the question must be determined by the jury as a fact and not by
321 the court as a question of law.

Hence, if the employer "shall by rules, regulations or in-

structions inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employments" as required by Paragraph 3157, and during the course of such employment any employee so informed, does an act beyond his duty or in violation of the restrictions of his employment dangerous in character, and suffers injury from an accident occurring, the employer may defend upon the grounds of both assumption of risk by the employee, and if the accident resulted from negligence the employer may interpose the defense of contributory negligence as the case may be. In either event the defense must be specially set forth and tried as an issue of fact. While the statute restricts the employer's right of defense, it does not abolish such rights.

The appellant questions the validity of the statute because the amount recoverable is not limited thereby. Section 6 of Article XVIII, State Constitution, provides that: "the amount
322 recovered shall not be subject to any statutory limitation;" and, Section 31 Article II, State Constitution, provides that: "No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person." A statute which would attempt to forcibly limit the amount recoverable for personal injuries suffered would be in direct conflict with these plain, simple provisions of the state constitution. Statutes which provide a limited amount in satisfaction of damages and leave to the parties interested the right to elect to abide by its provisions are controlled by other principles of law and justice and should not be confused with statutes imperative in their terms.

The appellant contends as a further grounds for reversal that the court erred in rejecting the evidence of Dr. Bacon as to the condition of appellee's eyes as the Doctor found such condition to be from a personal examination of appellee a short time after the accident.

With regard to the rejection of this testimony the record discloses that witness, Dr. Bacon, was the superintendent in
323 charge of appellant's hospital department when plaintiff was injured, and that plaintiff was treated for the injuries to his eyes under the supervision of Dr. Bacon, and to some extent plaintiff was treated personally by Dr. Bacon. Dr. Bacon testified fully and extensively as an expert in the matters of infections of wounds to the eyes and cause of such infections. He testified:

"I saw Mendez on the 1st day of July and inspected and saw his eyes. From my examination made of Mendez at that time I know what the condition of his eyes was. * * *

Q. Now, doctor, from your examination made at that time state what the condition of his eyes was?"

The plaintiff objected upon the ground that:

"* * * this is a privileged communication and is also a privileged you might say examination; that the doctor is disqualified to testify as to what he discovered by the examination for the reason that the man was at that time under his professional care and that the plaintiff has not consented to the testimony."

The court sustained the objection. The objection was based upon Subdivision 5 of Paragraph 1677, reading as follows:

"The following persons cannot be witnesses in a civil action: * * * (6) A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made
324 by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

The Supreme Court of the United States had before it the interpretation and application of this statute in A. & N. M. R. Co. v. Clark 235 U. S. 669, 59 L. ed. 415, and placed a construction on the statute drawing a distinction between knowledge gained by the physician through verbal communications made to him by the patient, and knowledge gained through a personal examination of the patient. The patient may be deemed to have given consent to the doctor's testifying with regard to knowledge gained through verbal communications made by the patient when the patient has referred to such communications in his pleadings or in testimony, but such reference does not open the door to the physician to also testify as to his knowledge gained by a personal examination of the patient, and such is the testimony called for by the question. The construction placed on the statute by the Court in the Clark
325 case, and the application there made are so evidently correct that I fully concur in both positions there taken, and adopt them as entirely applicable here within the correct understanding of the said statute.

The objection that the verdict is not sustained by the evidence does not point out wherein the failure of the evidence occurs. The claim is made that the verdict is excessive because it rests on the plaintiff's evidence, the testimony of the Doctor having been excluded. In answer to such objection all the law required the record to show is substantial evidence in support of the verdict. This is shown by the record. The matter of the weight of evidence is left with the jury solely, and the jury's determination of that matter will not be disturbed on appeal.

I find no reversible error in the record. Consequently, I am of the opinion the judgment must be affirmed.

(Signed) D. L. CUNNINGHAM, *Judge.*

We concur:

(Signed) ALFRED FRANKLIN,
Chief Justice.

326 —— ——, *Judge.*

Ross, *J.* (Dissenting):

I dissent. Later I will file my reasons.

(Signed) HENRY D. ROSS, *Judge.*

Endorsement: Filed July 2, 1917. C. F. Leonard, Clerk Supreme Court.

Dissenting Opinion.

(Title of Court and Cause.)

Ross, *J.* (Dissenting):

The majority opinion states the facts upon which this case is based. It is clear therefrom the appellant was guilty of no negligent act. Indeed, it is not suggested either by pleadings or otherwise that the accident was caused by any act of appellant. On the contrary the facts would seem to indicate a lack of caution or skill upon the part of appellee.

I agree with the majority opinion that the state is clothed with power to require the employer without fault to compensate
327 his employee for injury or in case of his death, his dependents. This principle is too well settled to be now questioned. I am satisfied that the state legislature in the absence of constitutional limitations and directions as set forth in Section 7 Art. 18 of the State Constitution could have enacted a law providing for compensation to employees injured without fault of the employer, along the general lines of the various compensation acts of the different states of the Union. I think also that under the provisions of Sec. 7, Art. 18, it was possible to formulate a law giving compensation to the employee when injured without any fault of the employer. In other words, I am of the opinion that the mandate contained in said section and article of the Constitution is not violative of any provision of the Constitution of the United States. My quarrel is with the legislation under that mandate and not the mandate itself.

Chapter VI Title 14, Civil Code 1913, creates a liability without fault but adopts no system or scale of compensation. It leaves the liability to be ascertained by a jury, as under the common law action for tort. It injects incongruities as to defenses allowed
328 the employer on account of the employee's negligence. These latter I will not discuss here for whatever view is taken of them, they do not relieve the method of ascertaining the liability, of serious and in my opinion, fatal constitutional objections.

In the first place, I will consider the nature of this so-called Employers' Liability Law. It is designated as such both by the Constitution and the legislature. There is not much in the name, the true test of what the right of action is, or was intended to be, must in this case as in all others, be ascertained from the words used to describe and define it.

The Constitution directs the legislature to "enact an Employers' Liability Law, by the terms of which any employer * * * shall be liable for the death or injury caused by any accident due to a condition or conditions of such occupation, in all cases in which such death or injury of such employee shall not have been caused by negligence of the employee killed or injured." Sec. 7, Art. 18.

329 The liability enjoined and contemplated is one heretofore unknown to our laws. Manifestly it is not an employer's liability law in the sense in which those terms are generally used and understood for the reason that liability laws are based on tort. They are in fact the common law right of action for negligence with most of the defenses heretofore allowed abrogated or greatly modified. They do not undertake to create liability without fault, as is done by our legislation.

Rounsville v. Central R. Co., 87 N. J. L. 371, 94 Atl. 392;
Winfield v. N. Y. Central R. Co., 216 N. Y. 284, 110 N. E. 614;
Ann. Cas. 1916 A 817, Note to Seaboard A. L. B. Co. v. Horton, L. R. A. 1915 C 54.

These cases hold that a law making the employer liable without fault creates a new right of action unknown to the common law. The legislation is a new departure creating a new liability. It is said:

"This legislation is wholly in derogation of the common law. It is legislation which awards compensation for the accidental industrial injuries to be added to the cost of production." Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 N. W. 684.

330 The liability contemplated by our Constitution being therefore a new liability, it was within the power and province of the legislature to fix and regulate it, with no limitation on that power except the employer be given the equal protection of the law and that the method of ascertaining his liability be in accordance with due process of law.

In every other jurisdiction in this country except ours, where this new right of action has been created, the law has been called a "compensation law" and the award to the employee, or his dependents has been called "compensation". The liability or compensation is based upon the average wages and the extent of the injury suffered by the employee. It is not an action to recover "damages" as are the common law action for negligence and the action under the employer's liability law.

For some inexplainable reason the framers of our Constitution enjoined on the legislature the duty of enacting two laws for the same general purpose; namely: the creation of a liability of
331 the employer without fault. See Secs. 7 and 8, Art. 18. The latter differs from the first principally in that it is called a "compensation law" and authorizes recovery whether the employee causes the injury or not. In both instances the employer is made liable without fault. In the one as well as the other, the liability of the employer is a new one.

Under the Compensation Act, Chapter VH Title 14, Civil Code, the legislature provided a method of recompensing the employee for injury or death by an allowance based upon his ability as a wage earner and the extent of his injury,—in that respect following the compensation laws of other states. The legislature designates the recompense for injury or death under the Employer's Liability

Act as "damages for personal injuries" evidently intending thereby that the damages recovered should be ascertained and measured by the common law standard or by the rules governing in actions sounding in tort. In the matter and quantum of evidence to establish liability thereunder it is practically the same, if not identical, with the Workmen's Compensation Law. The pecuniary liability is, however, unlimited. It contemplates a trial by jury whose
332 only functions, necessarily in most cases, must be the fixing by their verdict the sum to be paid by the employer.

To an injured employee, or in case of his death, there are now open to him or his personal representatives or dependents, three avenues of redress; first, the Workmen's Compensation Law; Second, the Employer's Liability Law; and Third, the Common Law Action for Damages, supplemented by what is commonly known as the Lord Campbell Act. I have indicated somewhat of the nature of the first two. The status of the third or action for negligence, as it exists in this state at present, is as follows:

The common law doctrine of fellow servant is abrogated. The defense of contributory negligence and assumption of risks are questions of fact to be at all times left to a jury, and the right of action to recover damages for injuries may not be abrogated, nor may the amount of recovery be limited by statute. Sections 4, 5, and 6, Art. 18 and Section 31, Art. 2, Constitution.

These provisions of the Constitution were evidently intended to apply only to actions of negligence, in which the measure
333 of damages were to be according to the rules of the common law. Thus understood, the common law action for damages for personal injury is so modified and changed as really and in fact to constitute what is generally known as the employer's liability law.

That the above constitutional provisions do not apply to or affect the newly created rights of action for compensation against the employer is evident or else our Workmen's Compensation Act would be violative of the Constitution, in that it does limit the amount of recovery. For like reasons I think they do not apply to the liability created by the statute known as the Employer's Liability Act. This latter act creating new liability—one not known to the common law and in derogation thereof,—it would seem that the power of the legislature to fix the measure of compensation in disregard of the common law rule is as absolute as under the compensation act.

"The theory upon which the compensation law is based (which is now generally accepted) is that each time an employee is killed or injured there is an economic loss which must be made up or compensated in some way, that most accidents are attributable
334 to the inherent risk of employment,—that is no one is directly at fault—that the burden of this economic loss should be borne by the industry rather than by society as a whole, that a fund should be provided by the industry from which a fixed sum should be set apart as every accident occurs to compensate the person injured or his dependents, for his or their loss." (Italics mine). State v. Industrial Com., 92 Ohio St. 434, 450, 111 N. E. 299, L. R. A. 1916 D. 944.

The justification of such an economic rule and its substitution for the common law and employer's liability rule of damages for personal injury is variously stated by the courts, but all are based upon common ground:—That the state owes the duty to its members of preventing their becoming public charges by reason of injuries sustained in the industries of modern civil-ation, the duty to stop the waste of time and money in protracted and bitterly contested law suits and thereby remove one of the most potent causes of hatred, animosity and distrust between employer and employee, the duty to prevent unjust and bogus claims supported and opposed by perjury and subornation, and to see that bona fide claims for compensation are amicably and expeditiously settled, the duty of relieving the state from the expense of personal injury litigation and finally to see that the injured, or his dependents, receive not a moiety but all that the employer is required to pay.

335

Appeal of Hotel Bond Co., 89 Conn. 143, 146, 93 Atl. 245;
Cunningham v. Northwestern Imp. Co., 44 Mont. 180, 204, 119 Pac. 554;
Hawkins v. Bleakley, 220 Fed. 378, 379;
Stertz v. Industrial Ins. Co., 158 Pac. 256, 258;
Lewis v. Industrial A. C. C. Bd., 156 Pac. 268.

The reasons given by the courts to sustain the compensation laws, it is apparent from what has been said, cannot be invoked in support of our so called employer's liability law. None of the evils "of a difficult problem, affecting one of the most important of social relations," is done away with.

The majority opinion bases its judgment entirely upon the reasoning of the Supreme Court in New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. —, 37 Sup. Ct. 247, 13 N. C. C. A. 943, in which was considered the New York Workmen's Compensation Act. It is said in that case that the workmen's compensation act was a substituted system devised to compensate employees or their dependents for injuries in certain hazardous businesses, the measure of damages being based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability and in case of death, benefits according to the dependency of the surviving wife, husband or infant child. Our liability act is not a substitution for former rights and remedies. It creates a new right, not to take the place of old ones, but supplemental or cumu-ative in its nature. It leaves open to the injured employee or his personal representatives or dependents the common law action of negligence as modified by our Constitution, as also the right to claim under the Compensation Act.

336

Justice Pitney, in the White case, said that as between the employer and the employee, the common law defenses of the negligence of a co-employee, assumed risk and contributory negligence could be completely abolished without violating any fundamental right of the employer or the law of the land. He cites in support thereof a number of cases upholding the state and federal departures

from the common law rules of liability of the employer, but
337 he says, at page 252:

"It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common law rules respecting liability as between employer and employee, without providing a *reasonable substitute*. Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, *without setting up something adequate in their stead*. No such question is here presented, and we intimate no opinion upon it." (Italics mine.)

There is an intimation here that even the common law defenses of negligence of a fellow servant, assumed risk and contributory negligence may not be arbitrarily abolished without substituting in place thereof some rule or system befitting the conditions and situation, and when it is considered, that the act we now have in hand, is not substitutional—that it does not "set aside one body of rules only to establish another system in its place," but that it is
338 purely and simply cumulative, affording an additional, new and heretofore unknown right of action with practically all defenses of the employer abrogated, I think it is quite the supposititious case alluded to by Justice Pitney. This legislation has not attempted to "abolish all rights of action," but has created a new and additional right of action allowing no defense thereto except that it appear that the accident inflicting the injury was caused by the negligence of the employee. To say as the majority opinion does, that the negligence that will defeat a recovery by the employee, may be one of assumption or contribution is a violation and repudiation of the very definition of the right of action as defined. It certainly does not mean the negligence of working in a dangerous or hazardous place, or with careless, unskilled or incompetent co-employees. Neither does it mean contributory negligence, for in that case the injury would be caused by the combined negligence of the employer and employee and not "by the negligence of the employee killed or injured." It means a negligence by the employee at the instant of the injury or death and without which there would have been
339 no accident. It must mean some intentional or culpable act or omission. But whatever view may be taken of that, the employer is denied the right to defend by showing that the accident was through no fault of his, and an employee whose negligence caused the injury may fall back on the Workmen's Compensation

Act. If it is "due to a condition or conditions of the occupation," he may sue under the Employers' Liability Act.

In the White case it was decided that the state was competent to set aside one body of rules and to establish another system in its place. There the common law rules governing the liability of the employer to the employee were abrogated and in lieu thereof a system of compensation substituted. Of the substituted system it was said:

"Of course, we cannot ignore the question whether the new arrangement is *arbitrary* and *unreasonable,* from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and,
340 ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and, of necessity, bearing the entire losses. * * *

It is plain that, on grounds of natural justice it is not *unreasonable* for the state, while relieving the employer from responsibility for damages measured by *common-law standards* and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a *reasonable amount,* and *according to a reasonable* and *definite scale,* by *way* of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall,—that is, upon the injured employee or his dependents. Nor can it be deemed *arbitrary* and *unreasonable,* from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and *substitute* a *system* under which, in all ordinary cases of accidental injury, he is sure of a *definite* and *easily ascertained compensation,* not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale. * * *

In excluding the question of fault as a cause of injury, the
341 act in effect disregards the proximate cause and looks to one more remote,—the primary cause, as it may be deemed,—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. * * *

Viewing the entire matter, it cannot be pronounced *arbitrary* and *unreasonable* for the state to impose upon the employer the absolute

duty of making a *moderate* and *definite compensation* in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

This, of course, is not to say that *any scale* of *compensation*, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises." (Italics mine.)

Our liability law does not relieve "the employer from responsibility for damages measured by common law standards." It does not "require him to contribute a reasonable amount, according to a reasonable and definite scale, by way of compensation for loss of earning power." It is not a substituted system assuring the employee "a definite and easily ascertained compensation" and he is not re-
342 quired to assume "any loss beyond the prescribed scale." It violates the recognized power of "the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee * * * in lieu of the common law liability confined to cases of negligence", by permitting a recovery of an unlimited amount not for disability alone, as in the White case, but for physical suffering also. It is not a composition of losses sustained in a mutual joint adventure (as Justice Pitney reasons) in which accidental injury is inevitable and is expected, but it places all of the loss without limitation upon one of the "co-adventurers." There is in it no conception of having the employer and employee share in some measure or at all, the loss incidental to personal injuries, a basic consideration for upholding the New York Compensation Law.

It is said if the "scale of compensation" be too small or too large, it would not be "supportable". We have no scale of compensation. It is without limit. It may be ever so "insignificant, on the one hand, or onerous, on the other". Notwithstanding no criticism
343 of the *of the* compensation prescribed by the New York statute had been made, the Supreme Court laid much stress upon the necessity of the compensation being definite and reasonable and according to a fixed scale. When that is found in the law, it is said the arrangement is not arbitrary and unreasonable from the standpoint of natural justice. A very different case in fact and in reason from the one at bar. Ours is not a system, but a law suit. When an accident happens, instead of adjustment "according to a reasonable and definite scale", both sides prepare for a contest in the courts with all the attendant evils of the old system. When the litigation is finally ended and the fruits thereof, if successful, are paid over to the employee, whether inadequate or excessively large, both he and the employer have been wronged, in that a goodly portion of the recovery has been diverted from the beneficiary into various channels—such as attorney's fees, costs and expenses—all necessary under the system.

Natural justice would dictate that nothing should be taken from the employee, nor would it tolerate the dissipation of the em-

344 ployer's property as an unction to third or foreign parties. Natural justice would require that the amount to be paid by the employer and received by the employee should be reasonable according to a definite scale and should pass unimpaired and undiminished to the beneficiary.

The right of the state to require the employer without fault to compensate the employee or his dependents, when injured in the service of the employer is referable to the police power. As so many of the courts have said, this power is not capable of exact definition. It is recognized as the right a state has to enact laws for its preservation and betterment. It is elastic in that it expands with social and industrial necessities of the state and may be invoked to promote the health, safety and general welfare of the people. But there is a limit to its exercise. It may not be arbitrarily and capriciously exercised to deprive the citizen either of his property or liberty especially in a case of this kind where there is accruing benefit to neither the individual nor society as a whole. The Supreme Court in the White case has pointed out in no uncertain manner how "a just settlement of a difficult problem, affecting one of the most important of
345 social relations" may be solved, and that solution has not been followed or observed in the least by our legislation.

See also:

Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. Ed. —, 37 Sup. Ct. 260, 13 N. N. C. A. 927;

Hawkins vs. Bleakley, 243 U. S. 210, 61 L. Ed. —, 37 Sup. Ct. 255.

In the last case, it was contended by the Appellant-employer that the Iowa Compensation Act did not conform to "due process of law," in that it provided that if the employer rejected the act if should be presumed, in an action for damages by the employee, that the injury was the direct result of the employer's negligence. The contention was held unsound as it only cast the burden of proof upon the employer to rebut the presumption of fact and the court said:

"A provision of this nature, not unreasonable in itself and not *conclusive* of the *rights* of the parties, does not constitute a denial of due process of law," citing *Mobile*, Jackson and Kansas City R. R. Co. v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, Ann. Cas. 1912 A. 463. In this last case Justice Lurton said: "* * * it
346 must not under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main facts thus presumed. If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

Thus while it was held the state may change the rules of evidence so as to cast the burden of proof in the first instant upon the employer, it may not take from him all his defenses in actions for damages for personal injury. What may not be done "under the guise" of a rule of evidence surely cannot be accomplished by a direct thrust

COPY BOUND

of the legislature. In both the Hawkins and Turnipseed cases the court was considering actions for damages for personal injuries where the measure of damages was according to the standards of the common law, and for that reason the rules announced in those cases is the rule that should be applied in the case at bar.

Again in the Hawkins case, speaking of the power of the state to abolish the common law defenses of fellow servant, contributory negligence and assumed risk and authorizing a recovery as "for personal injury" when the employer rejects the compensation act or when both the employer and employee reject it, but reserving unimpaired all these defenses in case the employer accepts and the employee rejects the act, the court said:

347

"We cannot say that there is here an arbitrary classification within the inhibition of the equal protection clause of the Fourteenth amendment. * * * As already shown, the abolition of such defenses is within the power of the state, and the legislation cannot be condemned when that power has been *qualifiedly exercised* without unreasonable discrimination."

Our liability law not only abolishes the defenses named in a case of the kind we have here, but takes from the employer the right to defend by showing that he was guilty of no fault. The legislation is all in favor of the employee. The employer is given no chance to escape the unlimited liability imposed. The Iowa statute under consideration in the Hawkins case, gave the employer the alternative of paying a reasonable compensation according to a definite scale, refusing which, his only defense was to show that he was guilty of no negligence. Our liability offers no alternative, neither can the employer defend by showing he was without fault. Granting that the employer may defend by showing that the employee contributed to the accident or that he assumed risks not inherent in the occupation, an absurdity, it seems to me, still he is deprived of the fundamental right of showing he was without fault, and at the same time made liable for unlimited damages, as in a suit for personal injury according to the standards of the common-law,—and the law has provided no avenue of escape for him. This, it would seem, is "unreasonable discrimination" against the employer and in favor of the employee. That all defenses may be abolished and absolute liability imposed without fault, according to a reasonable and definite scale is not questioned, but it is inconcievable that one who is guilty of no wrong should be made liable to an injured employee in damages unlimited and unlimitable.

348

I am constrained to hold that the so-called Employers' Liability Act in so far as the procedure for the enforcement of the right of action created thereunder is concerned, is not a proper and lawful exercise of the police power of the state and further that it denies the employer due process of law in that it deprives him of the right to present all his defenses, at the same time allowing unlimited damages against him according to the standard of damages at common law.

349

At the expense of extending this opinion,—too long already—I wish to add: The right of action created by the act is not limited to

UND CLOSE IN CENTER

the employee, or in case of death, to his dependents. It extends to the parents, whether dependent or not, and the personal representative for the benefit of the estate, in the absence of certain enumerated classes. Thus an employer without fault may be mulct in damages to an estate which would go to heirs in no way dependent upon the deceased or, there being no heirs, it would escheat. This I conceive to be contrary to every dictate of natural justice. All employers in the occupations mentioned are not millionaires—some are just beginning, with no more means than the men they employ. It reaches the small contractor and small mine owner as well as the
350 larger concerns of the state. Yet these, under the law guilty of nothing other than a laudable ambition to better their condition, and incidentally build up and develope the industries of the state, may be forced to contribute to an estate that owes nothing or that may go to heirs in no way dependent on the deceased, or that may be escheated.

The workmen's compensation laws of the different states and foreign countries without exception, so far as I know, limit the benefits to the employee, or in case he dies, to his dependents.

In view of the fact that our Workmen's Compensation Act is not satisfactory to either employer or employee and our Employers' Liability Act, as shown, is clearly unconstitutional, as I see it, I feel constrained to express my opinion more at length than I otherwise would.

The Workmen's Compensation Act is generally conceded to give inadequate compensation for death and injury. It is compulsory on the employer only. The employee's option to accept
351 under it can be exercised after the injury; Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 Pac. 465, and is personal to the employee. The beneficiaries of the deceased cannot exercise the option at all or in any case. Behringer v. Inspiration Consolidated Copper Co., 17 Ariz. 232, 149 Pac. 1065. It therefore is not a "just settlement" of the rights and wrongs growing out of the relation of employer and employee. This confused, chaotic and unsatisfactory condition has had the attention of both employer and employee with a view of remedying it, but owing to a lack of co-operation by the last legislature with a joint committee representing both sides, nothing was accomplished. It is devoutly to be wished that a just, reasonable and equitable law following the lines of other states, settling the question, may soon find a place in this state.

(Signed) HENRY D. ROSS, *Judge.*

Endorsement: Filed Sept. 19, 1917. C. F. Leonard, Clerk Supreme Court.

352 In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

vs.

CEFERINO MENDEZ, Appellee.

Motion for Rehearing.

Comes now Inspiration Consolidated Copper Company, a corporation, the appellant in the above entitled cause, wherein the decision of this court was announced on the second day of July, 1917, affirming the judgment of the Superior Court of Gila County, State of Arizona, and moves the court for an order granting a rehearing of said cause in this court.

The grounds of this motion are as follows:

1. The court sustains the validity of the Employers' Liability Law upon the authority solely of the decision of the United
353 States Supreme Court in the case of New York Central Railroad Company vs. White, decided March 6, 1917, and reported in U. S. Advance Opinions, 1916, of the Lawyers' Co-operative Publishing Company, in pamphlet No. 9, issued April 1, 1917, at page 247, long subsequent to the submission of this cause to this court. The decision of the United States Supreme Court does not support the validity of the Liability Law, but on the contrary announces principles which cannot be reconciled with that law and require its condemnation.

2. The court in construing the Liability Law declares that under that law there can be no assumption of risk by the employee as to any of the risks inherent in the work in which he is engaged upon the theory that all such risks are ipso facto unavoidable by him regardless of what the fact may be. This is an unwarranted and erroneous construction of the law.

3. The court holds that the exclusion of the testimony of Dr. Bacon as to the condition of the plaintiff's eye when he first appeared at the hospital and presented himself for treatment
354 was correct. This ruling is rested upon the decision of the Supreme Court of the United States in the case of Arizona & New Mexico Railroad Company vs. Clark, 235 U. S. 669. The Clark case does not involve the question here presented as to the waiver of the privilege by the plaintiff by his voluntarily testifying concerning the treatment.

4. The court does not consider at all the important question upon which an assignment of error was based as to whether a workman who has accepted compensation under the Compensation Act can, notwithstanding such acceptance, maintain suit under the Liability

Law. This question merits the serious consideration of this court and the error of the lower court in its rulings upon it alone warrants the reversal of the judgment.

Appellant files herewith its brief in support of this motion.

Wherefore appellant moves that a rehearing of this cause be ordered.

Respectfully submitted,

EDWARD W. RICE,
Attorney for Appellant.

(Endorsement:) Filed July 17, 1917. C. F. Leonard, Clerk Supreme Court.

355 And heretofore and to-wit on the 25th day of September, 1917, being one of the regular juridical days of said Supreme Court of the State of Arizona, the following order was made and entered of record in said cause in words and figures following to-wit:

At this day it is ordered That the motion for Re-hearing filed herein by appellant be and the same is hereby denied.

356 In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

vs.

CEFERINO MENDEZ, Appellee.

Petition for Writ of Error.

To the Honorable Alfred Franklin, Chief Justice of the Supreme Court of the State of Arizona:

Inspiration Consolidated Copper Company, a corporation, the appellant in the above entitled cause, presents this its petition, and prays that a writ of error be allowed and issued in said cause from the Supreme Court of the United States to the Supreme Court of the State of Arizona, for the review of the judgment and proceedings of the Supreme Court of the State of Arizona in said cause, and that an order be made fixing the amount of security which the appellant shall give and furnish upon said writ of error in order to stay the execution of said judgment and all of the proceedings in said
357 cause until the determination thereof by the Supreme Court of the United States, and that the supersedeas bond on writ of error presented by appellant in accordance with such order for security be approved.

This action was instituted in the Superior Court of Gila County, State of Arizona, by appellee. Ceferino Mendez, against appellant, for the recovery of damages for personal injuries. Said action was

prosecuted wholly to enforce a liability created by Chapter VI of Title 14 of the Revised Statutes of Arizona of 1913, commonly known as the Arizona Employer's Liability Law. The appellant insisted at all times in the trial court that such law was unconstitutional and void, that it deprived appellant of its property without due process of law, and denied to it the equal protection of the law, and violated the Fourteenth Amendment to the Constitution of the United States. It urged this objection under its general demurrer, which was overruled, specially pleaded the same in paragraph II of its answer to the amended complaint, objected to all testimony at the beginning of the trial on this specific ground, and moved the court to direct the jury to find for the defendant for the same reason. Likewise,
358 after judgment for plaintiff, appellant seasonably moved for a new trial, urging the same point in divers ways. Upon appeal to the Supreme Court of the State of Arizona, appellant in its assignment of errors specifically urged the invalidity of this law because of its conflict with the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Arizona rendered its decision on the 2nd day of July, 1917, sustaining said law and holding that it did not violate the Fourteenth Amendment. Thereafter, and within the time prescribed by law and the rules of said Supreme Court of the State of Arizona, appellant presented and filed its petition for rehearing, which petition was denied by the Supreme Court of the State of Arizona on the 25th day of September, 1917.

Wherefore your petitioner feels aggrieved, and prays that a writ of error be allowed as aforesaid, and its supersedeas bond on writ of error be approved, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said court and the statutes of the United States, that said record, proceedings, and judgment may be inspected and
359 corrected according to law.

EDWARD W. RICE,
Attorney for Petitioner.

Filed: Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court.

Received a copy of the within Petition for Writ of Error this 17th day of November, 1917.

A. C. McKILLOP,
Attorney for Appellee.

In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

vs.

CEFERINO MENDEZ, Appellee.

Supersedeas Bond on Writ of Error.

Know all men by these presents:

That Inspiration Consolidated Copper Company, a corporation organized under the laws of the State of Maine and qualified
360 to engage in business in the State of Arizona, as principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and qualified to engage in business in the State of Arizona, as surety, are held and firmly bound unto the above named Ceferino Mendez in the sum of Seventy Five Hundred Dollars, to be paid to said Ceferino Mendez, for the payment of which well and truly to be made we bind ourselves, and each of us, our, and each of our, successors and assigns, jointly and severally, firmly by these presents.

Made, sealed, and dated this 17th day of November, 1917.

The conditions of the above obligation are such that

Whereas in that certain action above entitled, the above named principal has petitioned for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Arizona to examine and reverse the judgment rendered on the 2nd day of July, 1917, in the above entitled action by the Supreme Court of the State of Arizona, affirming the judgment theretofore rendered in said action in the Superior Court of Gila County, State of Arizona.

361 Now, therefore, if said principal, Inspiration Consolidated Copper Company, a corporation, shall prosecute its writ of error to effect, and if it fail to make its plea good shall answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof said principal and said surety have caused these presents to be executed as of the day and year first above written.

INSPIRATION CONSOLIDATED COPPER COMPANY, *Principal,*

By C. E. MILLS,
Its General Manager, and
EDWARD W. RICE,
Its Attorney of Record.

UNITED STATES FIDELITY AND GUARANTY COMPANY, *Surety,*

[SEAL.] By J. F. MAYER,
Its Attorney in Fact.

The foregoing bond and the surety therein named are approved this 19th day of November, 1917.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court of Arizona.

362 Received a copy of the within Supersedeas Bond on Writ of Error this 17th day of November, 1917.

A. C. McKILLOP,
Attorney for Appellee.

Filed: Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court.

In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

vs.

CEFERINO MENDEZ, Appellee.

Order Fixing Amount of Bond.

The appellant, Inspiration Consolidated Copper Company, a corporation, having this day filed its petition for a writ of error
363 from the Supreme Court of the United States to the Supreme Court of the State of Arizona to review the judgment of the Supreme Court of Arizona in the above entitled cause rendered on July 2, 1917, together with an assignment of errors, within due time, and praying that an order be made fixing the amount of security which appellant should give and furnish upon said writ of error, and that upon the giving of such security all further proceedings of the Supreme Court of Arizona be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States, and said petition having this day been allowed,

It is ordered that upon the appellant, Inspiration Consolidated Copper Company, filing with the Clerk of this court a good and sufficient bond in the sum of Seventy Five Hundred Dollars, conditioned as required by law, and the approval of said bond by the undersigned, all further proceedings in the above entitled action in the Supreme Court of Arizona and the trial court be and they are hereby suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

364 Dated this 19th day of November, 1917.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court of Arizona.

Filed: Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court of Arizona.

In the Supreme Court of the State of Arizona.

No. 1508

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

vs.

CEFERINO MENDEZ, Appellee.

Assignment of Errors.

Inspiration Consolidated Copper Company, a Corporation, appellant in the above entitled cause, files the following assign-
365 ment of errors, upon which it will rely in the prosecution of its writ of error in the above entitled cause from the judgment of the Supreme Court of the State of Arizona rendered on the 2nd day of July, 1917, affirming the judgment of the Superior Court of Gila County, State of Arizona.

1. The trial court erred in overruling the demurrer to plaintiff's complaint. It was urged in support of this demurrer that Chapter VI of Title 14 of the Revised Statutes of Arizona of 1913, under the provisions of which this action was instituted and prosecuted, was unconstitutional and void, in that it created unlimited liability without fault, and that it deprived the defendant and appellant of its property without due process of law, and denied to it the equal protection of the laws, and violated Section 1 of Article XIV of the Amendments to the Constitution of the United States.

2. The trial court erred in overruling the objection on the part of defendant and appellant to the reception of any testimony in the cause. Said objection was specifically based upon the same grounds as were urged in support of the demurrer, as set forth in Assignment No. 1.

366 3. The trial court erred in denying the motion and request of defendant and appellant that the jury be directed to return a verdict in favor of the defendant. This motion and request was based upon the same ground of the invalidity of the statute under which suit was brought as is fully set forth under Assignment No. 1.

4. The trial court erred in denying the motion for a new trial. In support of this motion defendant and appellant urged the invalidity of the law under which the suit was brought upon the ground and for the reasons set forth in Assignment No. 1.

5. The Supreme Court of Arizona erred in affirming the judgment of the trial court for each of the reasons set forth in each of the assignments numbered 1 to 4, inclusive.

6. The Supreme Court of Arizona erred in affirming the judgment and holding that Chapter VI of Title 14 of the Revised Statutes of Arizona of 1913, commonly known as the Arizona Employer's Liability Law, is valid, and that the same does not violate the Four-

teenth Amendment to the Constitution of the United States,
367 for the reason that said law creates an unlimited liability without fault, and deprives the appellant of its property without due process of law, and denies to it the equal protection of the laws, and violates said Fourteenth Amendment.

EDWARD W. RICE,
Attorney for Plaintiff in Error.

Endorsement: Filed Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court.

In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

vs.

CEFERINO MENDEZ, Appellee.

Prayer for Reversal.

Comes now Inspiration Consolidated Copper Company, a
368 corporation, the plaintiff in error, and prays for a reversal of the judgment rendered by the Supreme Court of the State of Arizona on the 2nd day of July, 1917, affirming the judgment of the Superior Court of Gila County, State of Arizona, in the above entitled cause.

Dated this 19 day of November, 1917.

EDWARD W. RICE,
Attorney for Plaintiff in Error.

Endorsement: Filed Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court.

In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

vs.

CEFERINO MENDEZ, Appellee.

369 *Order of Allowance of Writ of Error.*

On this 19th day of November, 1917, Inspiration Consolidated Copper Company, a corporation, by its counsel, regularly presented to the undersigned, Alfred Franklin, the Chief Justice of the Su-

preme Court of the State of Arizona, which is the highest court of said State in which the above entitled action could be heard, its petition for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Arizona, and for the fixing of the amount of security to be given on said writ to stay the execution of the judgment, together with its assignment of errors and its prayer for reversal; and it appearing from the petition filed herein, and the record filed herewith, that said petition ought to be granted, and that a transcript of the record, proceedings, and papers upon which the judgment of said Supreme Court of the State of Arizona was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in said petition, and the amount of security to be given having been fixed by the undersigned at the sum of Seventy Five Hundred Dollars,
370 and a bond in the sum so fixed, properly conditioned, having been presented to the undersigned.

It is therefore ordered that the writ of error be allowed, that the bond of petitioner be and it is hereby approved, and may operate as a supersedeas, and that a true copy of the record and assignment of errors, and all proceedings had in the above entitled cause in the Superior Court of Gila County, State of Arizona, and in the Supreme Court of the State of Arizona, together with all other papers and proceedings required by law, shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said Supreme Court of the United States may inspect the same and do what according to law should be done.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court of the State of Arizona.

371 UNITED STATES OF AMERICA,
District of Arizona, ss:

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true and correct copy of an order allowing writ of error in the case of Inspiration Consolidated Copper Company, a corporation, appellant, versus Ceferino Mendez, appellee, on writ of error to the Supreme Court of the United States, as the same appears from the original order on file and of record in my office at Tucson, Arizona.

Witness my hand and seal of said court affixed hereto at Tucson, Arizona, this 20 day of November, 1917.

[SEAL.] MOSE DRACHMAN,
Clerk of the United States District Court.

Endorsement: Filed November 24, 1917. C. F. Leonard, Clerk Supreme Court.

372 In the Supreme Court of the State of Arizona.

Clerk's Certificate.

SUPREME COURT,
State of Arizona, ss:

I, C. F. Leonard, Clerk of the Supreme court of the State of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 371, inclusive, contain a full, true and complete transcript of the original Complaint, original Answer, amended Complaint, Answer to Amended Complaint, Minute entries of the Superior Court, transcript of the reporter's notes, omitting the examination of the jurors; instructions requested by Defendant, instructions given by the trial court, the Verdict, Judgment of the trial court, motion for a new trial, Notice of appeal to the Supreme Court, Supersedeas Bond on appeal, Assignments of error on appeal, Judgment of Supreme Court,
373 Opinion of the Supreme Court, dissenting opinion of Judge Ross, Petition for Re-hearing Order denying Petition for Re-hearing Petition for Writ of Error, Assignments of Error, Prayer for Reversal, Order fixing amount of Bond, Supersedeas Bond on Writ of Error, and Order allowing Writ of Error, in cause No. 1508, wherein Inspiration Consolidated Copper Company, a corporation, is Appellant, and Ceferino Mendez is Appellee; as the same remain on file and of record in my office; being all that portion of the original record indicated by the appellant herein by its præcipe filed in said cause, as necessary to the consideration of the questions to be reviewed on Writ of Error to the Supreme Court of the United States.

And I further certify that the Writ of Error and Citation showing service thereon, and hereto attached, is the original Writ of Error and Citation issued and allowed by the said Supreme Court of the State of Arizona in the above entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Arizona, at the City of Phœnix, this 27th day of December, A. D., 1917.

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,
Clerk of the Supreme Court of the State of Arizona.

374 In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

vs.

CEFERINO MENDEZ, Appellee.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Arizona before you, or some of you, being the highest court of the said State in which a decision could be had in the said suit between Inspiration Consolidated Copper Company, a corporation, and Ceferino Mendez, wherein was drawn in question the validity of a statute of said State of Arizona, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, a manifest error hath happened to the said Inspiration Consolidated Copper Company, a corporation, as by its complaint appears. We, being willing that error, if any hath happened, should be duly corrected, and full and speedy justice
375 done to the parties aforesaid, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty (60) days from the date hereof, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court of the United States, the 20th day of November, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN,
Clerk of the United States District Court
for the District of Arizona.

The foregoing writ is hereby allowed this 21st day of November, 1917.

ALFRED FRANKLIN.
Chief Justice of the Supreme Court of the State of Arizona.

[Endorsed:] No. 1508. In the Supreme Court of the State of Arizona. Inspiration Consolidated Copper Company, a corporation, Appellant, vs. Ceferino Mendez, Appellee. Writ of Error. Edward W. Rice, Attorney at Law, Globe, Arizona. Filed Nov. 24, 1917. C. F. Leonard, Clerk Supreme Court.

376 Received a copy of the within Writ of Error this 22nd day of November, 1917.

A. C. McKILLOP,
GEO. F. SENNER,
Attorneys for Plaintiff and Appellee, Ceferino Mendez.
A. C. McKILLOP.
GEO. F. SENNER.

377 In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

vs.

CEFERINO MENDEZ, Appellee.

Citation on Writ of Error.

To Ceferino Mendez, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden in the City of Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Arizona wherein Inspiration Consolidated Copper Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and reversed and justice done in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 21st day of November, 1917.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court of the State of Arizona.

Attest:

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,
Clerk Supreme Court of the State of Arizona.

Received a copy of the within Citation this 22nd day of November, 1917.

A. C. McKILLOP,
GEO. F. SENNER,
Attorneys for Plaintiff and Appellee, Ceferino Mendez.

[Endorsed:] No. 1508. In the Supreme Court of the State of Arizona. Inspiration Consolidated Copper Company, a corporation, Appellant, vs. Ceferino Mendez, Appellee. Citation on Writ of Error. Edward W. Rice, Attorney at Law, Globe, Arizona. Filed Nov. 24, 1917. C. F. Leonard, Clerk Supreme Court.

Supreme Court of the United States, October Term, 1917.

No. 819.

THE INSPIRATION CONSOLIDATED COPPER COMPANY, Plaintiff in Error,

vs.

CEFERINO MENDEZ, Defendant in Error.

Specification of Points to Be Relied upon and Designation of Portions of Transcript of Record Necessary to Be Considered by the Court.

Plaintiff in error, the Inspiration Consolidated Copper Company, states, pursuant to the provisions of paragraph 9 of Rule 10 of the Rules of Practice of the Supreme Court of the United States, that, in the future prosecution of the above entitled cause, it intends to rely for reversal of the judgment of the Supreme Court of Arizona, upon the following:

That the provisions of Chapter VI of Title 14 of the Revised Statutes of Arizona of 1913, commonly called and known as the Employers' Liability Law, as construed and applied by the Supreme Court of Arizona, are unconstitutional and void in that they deprived plaintiff in error of its property without due process of law and denied to it the equal protection of the law, and therefore violated the Fourteenth Amendment to the Constitution of the United States.

For such purpose plaintiff in error deems it necessary to reproduce in print for the convenience and consideration of this Honorable Court only the following parts of the original transcript of record on file in this cause, viz.:

1. Complaint, pages 1 to 4.
2. Answer, pages 4 to 5.
3. Amended complaint, pages 6 to 9.
4. Answer to amended complaint, pages 9 to 14.
5. Order overruling demurrer, pages 15 to 16.
6. Verdict, page 281.
7. Judgment, pages 281 to 283.

8. Motion for new trial, pages 283 to 284.
9. Excerpts from transcript of record—

a. Objections to introduction of any further testimony, bottom of page 36 and top of page 37, including the ruling of the court thereon and exceptions thereto.

b. Instructions requested by defendant, viz., Instruction to return verdict for defendant, page 273 B, and page 278.

c. Extracts from the charge as given, viz., the first, second and third instructions on pages 271 and 272, as to the scope of the Liability Law, and the following instructions to and including that on page 272, to the effect that the defendant's negligence bars the suit, and the further instruction on page 272 that the injury must be due to the condition of the work as defined.

10. Notice of appeal, page 287.
11. Assignment of errors in State Court, pages 288-291.
12. Opinion of Supreme Court of Arizona, pages 294-326.
13. Dissenting opinion of Judge Ross, pages 326-351.
14. Motion for rehearing, pages 352-354.
15. Order denying motion for rehearing, page 355.
16. Petition for writ of error, pages 356 to 359.
17. Assignment of errors, pages 364 to 367.
18. Prayer for reversal, pages 367 to 368.
19. Order fixing amount of bond, pages 362 to 363.
20. Supersedeas bond on writ of error, pages 359 to 362.
21. Order allowing writ of error, pages 369 to 370.
22. Certificate of Clerk of United States District Court, page 371.
23. Certificate of Clerk of Supreme Court of Arizona, pages 372 to 373.
24. Writ of error.
25. Citation.

381 Respectfully submitted,

EDWARD W. RICE,
HARVEY M. FRIEND,
Attorneys and Counsellors for The Inspiration Consolidated Copper Company.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Harvey M. Friend, being first duly sworn, deposes and says he is one of the counsel for the plaintiff in error in the foregoing above-entitled cause. That on the 31st day of January, 1918, he served the foregoing specification of points and designation of parts of record to be printed upon A. C. McKillop, attorney at law of Globe, Arizona, one of the attorneys and counsel for the defendant in error in this cause, by mailing him a true and correct copy thereof by registered letter, as appears from the registry receipt thereof hereto attached.

HARVEY M. FRIEND.

Subscribed and sworn to before me this 31st day of January, 1918.

[Seal Chas. E. Alden, Notary Public, District of Columbia.]

CHAS. E. ALDEN,
Notary Public in and for Washington, D. C.

My Commission Expires Sept. 13, 1922.

Receipt for Registered Article.

No. 192753.

Class Postage —.

Registered at the Post Office Indicated in Postmark.

Complete record of registered mail is kept at the post office, but the sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry.

POSTMASTER,
Per P.

Form 3806.

[Stamped across face:] Return receipt demanded.

[Stamped on margin:] Postmark clearly, showing date and office. [Postmark illegible.]

382 [Endorsed] 819. 26286. No. 819. October Term, 1917. Inspiration Consolidated Copper Company, Pltiff. in Error, vs. Ceferino Mondez, Deft. in Error. Specification of Points to be relied upon & designation of parts of transcript of record to be printed. Edward W. Rice, Harvey M. Friend, Attorneys and Counsellors at Law, Offices, Suite 501-4 Ouray Building, Washington, D. C.

383 [Endorsed:] File No. 26286. Supreme Court U. S., October Term, 1917. Term No. 819. Inspiration Consolidated Copper Company, Plaintiff in Error, vs. Ceferino Mendez. Statement of points to be relied upon and designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed January 31, 1918.

Endorsed on cover: File No. 26,286. Arizona Supreme Court. Term No. 819. Inspiration Consolidated Copper Company, plaintiff in error, vs. Ceferino Mendez. Filed January 18th, 1918. File No. 26,286.

ANALYSIS OF BRIEF.

Page

CASES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 332.

INSPIRATION CONSOLIDATED COPPER COMPANY,
PLAINTIFF IN ERROR,

vs.

CEFERINO MENDEZ, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

I. Statement of the Case.

(a) *The Facts:*

This cause comes to this court on writ of error to review the decision of the Supreme Court of the State of Arizona affirming the judgment of the Superior Court of Gila County in favor of the plaintiff in a personal-injury action.

The plaintiff, Mendez, was a miner of long experience, familiar with the operation of drills and the handling of explosives. At the time of the accident out of which the

action arose he was employed by the defendant in its mine. It was arranged between Mendez and his co-workers that he should light the fuses in certain holes drilled in the mine and loaded with explosives, and as soon as that was accomplished he should open a valve upon the compressed-air pipe near at hand and thus release the current of air in the drift so as to clear the mine of the powder smoke from the impending blasts and enable the miners to resume their labors thereafter in comfort. The fuses were of such length as to afford ample time for Mendez, after lighting them, to turn on the air and to reach a place of safety before the powder would explode.

The pressure of the air in the pipe against the valve was considerable. Mendez stooped over the valve, grasped with both hands the valve handle—a shaft some six inches long—and opened the valve. The swiftly outrushing air current carried some foreign body, rock or metal particles into his face and against his right eye. Infection set in, a corneal ulcer developed, and the visual power of the eye was practically destroyed.

(b) *The Law:*

Suit was instituted under the provisions of chapter 6 of title 14 of the Revised Statutes of Arizona of 1913, locally known as the Arizona Employers' Liability Law. No question of the employer's negligence arose in the case, either as a matter of pleading or of proof. The litigation was conducted throughout upon the theory that negligence was an element entirely foreign to the liability declared in the law and sought to be enforced in this action. A verdict was returned by the jury in favor of the plaintiff for $5,500, less a credit for moneys paid, and judgment was entered accordingly.

(c) *The Attack on the Law:*

In the trial court the defendant repeatedly challenged the validity of the liability law on the ground that it violated

the Fourteenth Amendment. The attack was made by demurrer (Transcript of Record, page 2), by answer (Transcript of Record, page 5), by objection to the introduction of any testimony (Transcript of Record, page 8), by requested instructions (Transcript of Record, page 10), and on motion for a new trial (Transcript of Record, page 11).

By proper specific assignments of error these attacks on the constitutionality of the law were presented to the State Supreme Court (Transcript of Record, pages 12 and 13). The highest court of the State considered the constitutional question at length in its opinion (Transcript of Record, page 14, folio 295; pages 17 to 25, folios 304 to 322; pages 27 to 36, folios 326 to 351, inclusive). The court sustained the law and affirmed the judgment (Transcript of Record, page 13, folio 292).

The validity of this law is the sole question in this case on this writ.

II. Specification of Errors.

The assignment of errors filed herein (Transcript of Record, pages 42 and 43, folios 365 to 367) raises this single point of the validity of the Arizona Employers' Liability Law. This point may be restated as follows: That the provisions of chapter 6 of title 14 of the Revised Statutes of Arizona of 1913, called the Employers' Liability Law, as construed and applied by the Supreme Court of Arizona, are unconstitutional and void, in that they deprive the plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, and therefore violate the Fourteenth Amendment to the Constitution of the United States, for the reasons that the law seeks to impose an unlimited liability in the absence of negligence, and is unreasonable, arbitrary and confiscatory.

III. ARGUMENT.

It is the contention of plaintiff in error that the Arizona statute deals only with individual rights and liabilities, and that it is not a measure designed to advance the public interest by achieving social justice. It is the further contention of plaintiff in error that whether the law be held to relate only to private rights or whether it be deemed charged with a public interest, it must in either event be held invalid, as contrary to natural justice, and unreasonable and confiscatory in its nature, and therefore in violation of the fundamental provisions of the Fourteenth Amendment.

The argument will be developed under the following heads:

1. The Law: Its place in the legal system of Arizona, and its interpretation, operation and effect.

2. Its validity as a labor law merely determining the rights and liabilities of individuals.

3. Its validity as a law charged with a public interest.

1. The Law: Its place in the legal system of Arizona, and its interpretation, operation and effect.

Section 7 of Article 18 of the Constitution of Arizona provides:

> "Section 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the legislature shall enact an Employers' Liability Law, by the terms of which any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupa-

tion, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

Pursuant to this mandate the legislature enacted what is now chapter 6 of title 14 of the Revised Statutes of 1913, which reads, in full, as follows:

"CHAPTER VI.

"LIABILITY OF EMPLOYERS FOR INJURIES TO WORKMEN IN DANGEROUS OCCUPATIONS.

"3153. This chapter is and shall be declared to be an employers' liability law as prescribed in section 7 of article XVIII of the State Constitution.

"3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the State Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

"3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

"(1.) The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated.

"(2.) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

"(3.) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

"(4.) The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

"(5.) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

"(6.) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

"(7.) All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

"(8.) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

"(9.) All work in the construction and repair of tunnels, subways and viaducts.

"(10.) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any

other mechanical power is used to operate machinery and appliances in and about such premises.

"3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

"3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee; and, if none, then to his personal representative, for the benefit of the estate of the deceased.

"3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in section 5 of article XVIII of the State Constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death,

the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

"3160. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any employer to exempt himself or itself from any liability created by this chapter, shall to that extent be void; provided, that in any action brought against any such employer under or by virtue of any of the provisions of this chapter, such employer may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity or that it may have paid to the injured employee or his personal representative on account of the injury or death for which said action was brought.

"3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

"3162. No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

Article 18 of the Arizona Constitution, entitled "Labor," contains a comprehensive program. Section 1 creates an eight-hour day in all public employment; section 2 prohibits the employment of minors of certain ages in enumerated occupations and limits their hours of labor; section 3 invalidates contracts discharging employers from liability for injuries due to their negligence; section 4 abrogates the

fellow-servant doctrine; section 5 declares that "the defense of contributory negligence or of assumption of risk shall in all cases whatsoever be a question of fact, and shall at all times be left to the jury;" section 6 provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation;" section 7, as is above quoted, calls for the enactment of the liability law in question in this case; section 8 commands the legislature to enact a Workmen's Compulsory Compensation Law, and reads as follows:

> "Section 8. The legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents or employee, or employees, to exercise due care, or to comply with any rule affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this constitution."

Section 9 forbids the exchange, solicitation or giving out of any labor blacklist; and section 10 limits employment on public works to citizens or those who have declared their intention to become citizens, and permits employment of prisoners on such work.

The legislature in 1912 enacted a Workmen's Compulsory Compensation Act under the mandate contained in section 8 of the article of the Constitution on Labor, and this

law is still in force. The legislature also re-enacted the law which had existed in territorial days, giving an action for death by wrongful act (Title 23, Revised Statutes of 1913).

Thus, in Arizona, one who has suffered personal injury in the employments listed in the Liability Law—which are substantially identical with those covered by the Compensation Act—may have a possible choice of three remedies: First, an action for negligence as at common law, with the common-law defenses modified by the Constitution; second, an action under the Liability Law; and, third, a demand for compensation under the Compensation Act, with a suit to enforce payment of compensation if it is refused, as provided in the Compensation Act. Consolidated Arizona Smelting Co. *vs.* Ujack, 15 Ariz., 382, 384; 139 Pac., 465, 466.

In case death ensues, suit may be brought under title 23 of the Revised Statutes of 1913, if it be due to wrongful act, and under the Liability Law if no negligence is present.

It is apparent from a consideration of the article on labor that the framers of the Constitution intended: First, to preserve and perfect the employee's common-law right of action for negligence; second, to supplement that right by the creation of a new right of action for non-negligent injuries; and, third, to confer upon employees a right to compensation for all injuries, both negligent and non-negligent, and thus doubly cover the entire field.

In conformity with this constitutional scheme, the legislature, by means of the Liability Law, subsequently enacted, created a liability for non-negligent injuries. In the present case the Supreme Court of Arizona said:

> "The appellant contends, and I think his contention is correct, that the liability statute must be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer, as such negligence is understood in the

> common law of liability; in other words, such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer. The cause was tried upon that theory, and the judgment must stand or fall according to the validity or invalidity of the said statute."
>
> Inspiration Con. Cop. Co. *vs.* Mendez, 166 Pac., 278, at 281.

In Arizona Copper Co. *vs.* Burciaga, 177 Pac., 29, at 31, in a decision handed down on December 21, 1918, the Supreme Court of Arizona said:

> "As clearly intimated by this court in Inspiration Consolidated Copper Co. *vs.* Mendez, 19 Ariz., —; 166 Pac., 278, 1183, the Employers' Liability Law is designed to give a right of action to the employee injured by accident occurring from risks and hazards inherent in the occupation and without regard to the negligence on the part of the employer. Such is the clear import of the said Employers' Liability Law. Whether the employee's negligence becomes an element in actions based upon such statute depends upon whether the defendant injects into the cause such questions by means of setting up negligence on the part of the plaintiff as contributing to plaintiff's injuries as a partial defense, or the negligence of the employee as the sole proximate, efficient cause of the injury.
>
> "In all other cases the question as to whether the defendant is guilty of negligence which proximately caused the accident and resulting injuries to the plaintiff is wholly beyond the questions involved and immaterial to the inquiry. The cause of the action and the right of recovery granted by chapter 6, tit. 14, Employers' Liability Law, exists without regard to negligence on the part of the defendant employer. If the injured workman relies for recovery upon the negligence of the employer as a cause for action, he must pursue the common-law remedy, as he is given no remedy to recover for negligence by the Employers' Liability Law. That statute takes no cognizance of negligence as an element in the right of

> action given, and the presence in or absence of negligence from the accident relied upon for recovery under the statute adds nothing to or takes nothing from the rights of the parties, except as above noted."

This liability for non-negligent injuries is to be enforced by a civil action, tried before a court and jury, in which the only issues presentable are the issues of employment, of the happening of the alleged accident, and the question whether it was due to the condition or conditions of the employment or to the negligence of the plaintiff. The questions of assumptions of risk and contributory negligence, though specifically referred to in the law as defenses, are denied to the defendant for all practical purposes. Inspiration Con. Cop. Co. *vs.* Mendez, 166 Pac., 278, at 284. In fact the Supreme Court of Arizona, in Superior & Pittsburg Copper Co. *vs.* Tomich, 165 Pac., 1101, at 1104, says that the defendant cannot plead contributory negligence without thereby conclusively admitting that he was himself guilty of negligence. To the same effect see Arizona Copper Co. *vs.* Burciaga, 177 Pac., 29, at 31; Calumet & Arizona Mining Co. *vs.* Chambers, 176 Pac., 839, 842. If this intimation is sound, there would be injected by the implied admission of the defendant an issue entirely foreign to the controversy. Obviously the intimation is unsound. It proceeds from the definition of contributory negligence sometimes given in negligence cases as being such negligence on the plaintiff's part as in concurrence with the defendant's negligence contributes to the injury. Granting the correctness of this definition of contributory negligence in its common-law significance, in common-law cases, the term cannot have such meaning when used in a statute confined to liability for non-negligent injuries. In such a law, if it means anything, it can only mean negligence of the plaintiff, which while not the sole cause of the accident, nevertheless does contribute with the unavoidable risks of the work, which constitute the conditions of the employment, to bring about the injury.

Plaintiff's negligence may contribute with such risks in a liability law case quite as readily as it may concur with a defendant's negligence in a negligence case, and in neither instance should defendant's allegation of contributory negligence be deemed an admission that the force or factor with which plaintiff's negligence contributed was one for which the defendant would be liable. Aside, however, from this anomaly, in the interpretation of the law by the Arizona Supreme Court the defenses of assumption of risk and contributory negligence are substantially non-existent. Perhaps these defenses are inconsistent with the liability created and should not be available. In fact, there is practically no defense available. As Justice Ross says, in his dissenting opinion in the Mendez case, 166 Pac., 1183, at 1184:

> "It contemplates a trial by jury, whose only functions, necessarily in most cases, must be the fixing by their verdict the sum to be paid by the employer." 116 Pac., 1183, at 1184.

The award in such cases is called "damages." The measure of such damages is not prescribed in terms. The courts, however, apply in actions under this law the same measure of damages as is applied in common-law actions for tort. As Justice Ross states in his dissenting opinion, 166 Pac., 1183, at 1184:

> "The legislature designates the recompense for injury or death under the Employers' Liability Act as 'damages for personal injuries', evidently intending thereby that the damages recovered should be ascertained and measured by the common-law standard or by the rules governing in actions sounding in tort."

In Arizona Copper Co. *vs.* Burciaga, 177 Pac., 29, at 33, in an opinion not participated in by Justice Ross, the Supreme Court uses this language:

> "Hence the language 'liable in damages,' as used in paragraph 3158, c. 6 of title 14, Employers' Liability Law, Rev. Stat. of Ariz., 1913, has reference to

and means that the employer becomes obligated to pay to the employee injured in an accident while engaged in an occupation declared hazardous, occurring without fault of the employer, all loss to the employee which is actually caused by the accident and the amount of which is susceptible of ascertainment. All idea of speculative, exemplary, and punitive damages are excluded from the meaning evidently intended to be conveyed by the expression used.

"Of course, mental and physical suffering experienced by the employee injured, proximately resulting from the accident, the reasonable value of working time lost by the employee, necessary expenditures for the treatment of injuries and compensation for the employee's diminished earning power directly resulting from the injury, and perhaps other results causing direct loss, are matters of actual loss and as such recoverable."

See also Calumet & Arizona Mining Co. *vs.* Chambers, 176 Pac., 839, 842.

It thus appears that the measure of damages in common-law actions applies with the elimination only of punitive damages. In other words, in an action for injuries not due to negligence, damages are awarded for pain, suffering and disfigurement in addition to loss of time and impaired earning capacity. The amount of the award is "unlimited and unlimitable." Inspiration Con. Cop. Co. *vs.* Mendez, 166 Pac., 278, at 284 and 1188. In practice, the awards are excessively large. Ross, Justice, dissenting, Superior & Pittsburg Copper Co. *vs.* Tomich, 165 Pac., 1185, at 1186. See award in Superior & Pittsburg Cop. Co. *vs.* Davidovich, 171 Pac., 127.

This law is in no sense a regulation of dangerous employments. The declared purpose "to protect the safety of employees" constitutes a false label for the law which follows. The provisions of paragraph 3157, relative to rules, regulations and instructions, effect no extension of the common-law duty which rests upon employers to adopt rules and to warn

and instruct employees where the circumstances require it. No new duty is imposed upon the employer and he is subjected to no liability for failure to discharge his duties, new or old. The liability is for inevitable accidents. The law merely imposes pecuniary liability for injuries that cannot be foreseen or prevented by any degree of care. The imposition upon the employer of pecuniary liability may mitigate the situation of the injured employee, but it cannot increase the care of the employer or protect the employee from injury. As Justice Pitney said in Coppage *vs.* Kansas, 236 U. S., 1, at page 15:

> "* * * When a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the State law, nor upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the State court."

Speaking of the statute involved in the Passenger Cases, 7 How., 283, 458, Justice Grier said: "Its true character cannot be changed by its collocation." Speaking of the law in question here, Justice Ross said:

> "There is not much in the name. The true test of what the right of action is, or was intended to be, must, in this case as in all others, be ascertained from the words used to describe and define it."
> 166 Pac., at 1184.

Judging the true character of this law by the words used to define the liability and by its operation and effect as applied and enforced by the courts of the State, it merely seeks to impose a new liability on employers. Such appears to be its sole purpose, as it is its sole accomplishment. It is devoid of all of the features that characterize measures which seek to attain social justice by regulating in the interest of the public

the private relation of master and servant out of which loss from industrial accidents are bound to arise.

Our conclusion is that this is merely a labor law confined to the rights and liability of the employee and employer and not a police measure in which the public has an interest. Consequently the question of its validity should be determined by the principles which govern laws affecting private rights as distinguished from those by which police measures enacted primarily to safeguard the public are to be tested.

2. The validity of the law as a labor law merely determining the rights and liabilities of individuals.

So long ago as 1810 this court, in the much-cited case of Fletcher *vs.* Peck, 6 Cranch, 87, at 135, declared that the "nature of society and of government" prescribes "some limits to the legislative power," and in accordance with that declaration the court concluded (p. 139) that the State of Georgia "was restrained *either by general principles which are common to our free institutions* or by the particular provisions of the Constitution of the United States" from impairing the patent title to land in the hands of an innocent purchaser for value. 6 Cranch, 139. In Chicago, B. & Q. R. Co. *vs.* Chicago, 166 U. S., 226, at 237, Mr. Justice Harlan quoted with approval the language of Chief Justice Marshall in Fletcher *vs.* Peck, and further quoted Mr. Justice Miller's observations in Citizens Saving & Loan Association *vs.* Topeka, 20 Wallace, 663, 665, as to the powers of the three branches of government:

> "There are limitations of such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

In Holden *vs.* Hardy, 169 U. S., 366, at 389, Mr. Justice Brown said:

> "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

In New York Central R. R. Co. *vs.* White, 243 U. S., 188, at 202, speaking of the New York Compensation Act under review, Mr. Justice Pitney said:

> "Of course we cannot ignore the question whether the new arrangement is arbitrary and unreasonable from the standpoint of natural justice."

The foregoing utterances are sufficient to demonstrate that this court, throughout its career, has recognized how firmly the fabric of free government rests upon the inviolability of private right. The preservation of individual liberty and the protection of private property and of the right of private contract are essential to all free government.

From the fact that private right must be subordinated to the public welfare, it does not follow that in those cases where the public welfare does not require the surrender of private right the legislature, merely as between individuals, may make arbitrary distribution of private losses. As this court said in Lochner *vs.* New York, 198 U. S., 45, at 56:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become

another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint."

Again:

> *"The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words.* There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. *Viewed in the light of a purely labor law,* with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act." (Italics ours.)

In the case of a mere labor law the slightest exaction would be beyond the legislative power, for, as this court said in Mountain Timber Co. *vs.* Washington, 243 U. S., 219, at 240, speaking of the imposition of a tax by the Washington law: "If not warranted by any just occasion, the least imposition is oppressive."

The law of negligence is founded upon reason. Under the law of the jungle, that might makes right, the strong and powerful oppressed and despoiled the weak at will. The first contribution of civilization was the placing of reasonable restraint upon the unlimited power of the strong. Gradually the law of obligation supplanted the old savage law of nonliability. It is reasonable that an individual should refrain from causing injury to another by his negligence, and that he should make recompense for injury so caused, but it is self-

evident that the establishment of a rule of unlimited liability without fault as the governing rule of individual responsibility would merely substitute for the old natural law of non-liability a new tyranny of irresponsible and arbitrary power. This is precisely what the Arizona law attempts to do.

The obligation of the individual to respond in damages for negligence and his right to immunity from liability when not at fault are thus among those obligations and rights that inhere in free government. It is because of their fundamental character that they have persisted throughout our legal history. Changes have been made from time to time in the administration of the law of negligence, as in the defenses available to relieve one charged with negligence, and in the extent of the duties assumed or imposed, the breach of which shall constitute negligence, and in the rules of evidence in such cases, but the individualistic basis of liability for personal injury, and its converse of immunity from responsibility in the absence of negligence, as rules of individual liability, have remained unchanged in their broad outlines.

Nothing inherent in free government or natural justice requires that one charged with negligence should be allowed to urge the defenses of assumption of risk, contributory negligence or fellow-servant, or that the conception of duties, the breach of which constitute negligence, should not develop with the unfolding industrial life of the people. Therefore, as this court has repeatedly declared, these defenses may be modified or entirely abrogated and new duties may be created.

New York Central R. R. Co. *vs.* White, 243 U. S., 188, 198, and following.

Mondou *vs.* New York, New Haven & H. R. Co., 223 U. S., 1, 51.

Munn *vs.* Illinois, 94 U. S., 113, 134.

The distinction is both clear and fundamental between the proposition that, regardless of these defenses, an employer shall be liable in damages for his negligence, either personal

or properly imputed to him, and the further proposition that he shall be liable as for negligence when he is in no sense at fault. Under the first proposition the question of negligence still remains, and on this fundamental question the defendant has the right to defend. Under the second proposition, liability is practically prejudged. If the right to defend cannot thus be taken away indirectly by a conclusive presumption of negligence (Mobile, Jackson & K. C. R. Co. *vs.* Turnipseed, 219 U. S., 35, at 43), it cannot be taken away directly by a departure from the principle of negligence as the basis of individual liability for injury.

As the Supreme Court of Texas said, in the recent case of Middleton *vs.* Texas Power & Light Company, 185 S. W., 556, at 559, in upholding the optional compensation law of that State:

> "A legislature may in proper instances prescribe duties and penalize their breach through an authorization for the recovery of consequent damages. But it is wholly without any power to deny the citizen the right of making any defense when sued in courts. There is no such thing in this country as taking one man's property without his consent and giving it to another by legislative edict. That is nothing less than confiscation by legislative decree. If this act, therefore, had declared an employer not consenting to its provisions absolutely liable to damages at the suit of an employee for any injuries sustained by the latter in the employment, without reference to any wrong or breach of duty committed by the employer, it would have been void. Such a law would have amounted to a legislature forfeiture of property rights, regardless of the holding of any court upon the question."

There are certain instances of liability which are sometimes cited as examples of liability without fault. Thus, in Chicago, Rock Island & Pacific R. R. Co. *vs.* Zernecke, 183 U. S., 582, at 586:

> "Our jurisprudence affords examples of legal liability without fault and the deprivation of property with-

> out fault being attributable to its owner. The law of deodands was such an example; the personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the torts of his wife, the liability of a master for the acts of his servant."

And in New York Central Ry. Co. *vs.* White, 243 U. S., 188, at 204:

> "Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the inn-keeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent *altogether* upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. St. Louis & S. F. R. Co. *vs.* Mathews, 165 U. S., 1, 22; 41 L. ed., 611, 619; 17 Sup. Ct. Rep., 243; Chicago, R. I. & P. R. Co. *vs.* Zernecke, 183 U. S., 582, 586; 46 L. ed., 339, 340; 22 Sup. Ct. Rep., 229." (Italics ours.)

The instances catalogued in these decisions are apparent departures from the common-law concept of liability for negligence only, but when analyzed they will be found to furnish no substantial basis in reason or in law for the support of legislation such as that presented in this case.

By the ancient law of deodands, the property of a man wholly innocent of wrong was confiscated by the Crown under the false cloak of religion. As we understand the doctrine, the offending chattel was forfeited, even though its victim was the owner of it. One of the chief sources of our pride in our English and American institutions today is that all such ancient tyrannies, both civil and religious, have long since passed away forever.

The other instances cited are apparent rather than real exceptions to the rule of non-liability in the absence of fault.

In admiralty, the ship itself is treated as a wrongdoer, but

is only answerable for the wrong of those in charge of her. As Justice Field said, in Sherlock *vs.* Alling, 93 U. S., 99, at 108:

> "By the maritime law the vessel as well as the owners is liable to the party injured *for damages caused by its torts.* By that law the vessel is deemed to be an offending thing and may be prosecuted without any reference to the adjustment of responsibility between the owners and employees *for the negligence which resulted in the injury.*" (Italics ours.)

The same doctrine is clearly expressed by the United States District Court in The Ville de St. Nazaire, 124 Fed., 1008, as follows:

> "The distinguishing feature of proceedings *in rem* is that the vessel or thing proceeded against is impleaded as a real defendant. In a case for damages such as this, *some fault or negligence on the part of those in control must be computed to the ship in order to charge it with liability.*" (Italics ours.)

The husband's liability for the torts of the wife arose at a time when the wife had no separate estate, and, in fact, no separate legal existence, and when, in law, the "two spouses were one person, and the husband that one." The master exercised over the servant in the course of his employment (and his liability was limited to acts of the servant within the scope of his employment) a real control, such as, in theory at least, the husband exercised over his wife. The maxim of agency *"qui facit per alium facit per se,"* which is the real foundation of the husband's liability as well as that of the master, involves imputed fault in cases where the relation of the parties furnishes some foundation in justice for the imposition of liability. The fault is there, but it may not be the personal fault of the person charged with responsibility for it.

The common-law liability of the carrier and of the innkeeper, of course, did not arise out of a mere personal rela-

tion. Both carriers and inn-keepers pursue a public calling, one charged with a public interest, and therefore peculiarly subject to regulation in the interest of the public. They must alike serve the public without discrimination, and the public must patronize them. It was never the law, so far as we know, that private carriers or private boarding-house keepers, who are free to serve whom they will, under such contracts as they may please to make, were liable as insurers to their patrons or guests.

The liability of one who employed fire or other dangerous agency or harbored a mischievous animal may be liability of an exceptional nature. Without actual negligence on the part of the defendant, however, damages rarely occur to others from these agencies. In the few cases where, despite the exercise of all possible care, injuries to others inevitably occur, there is some color for the claim that the agency is so dangerous to those having no interest in it and no control over it that its very maintenance is a nuisance and a public wrong. Whether this be so or not, the analogy between the responsibility for such agencies and liability for inevitable accidents in industry as between the joint adventurers pursuing such industry for their mutual profit is so remote as to furnish no real aid in the solution of the present problem. It appears, however, that the common-law obligation of the user of fire to keep it safe did not extend to those cases where its spread was caused "by a violent tempest *or other inevitable accident which he could not have foreseen.*" (Italics ours.) St. Louis & S. F. R. Co. *vs.* Mathews, 165 U. S., 1, at 6. Thus, at least as regards fire, whatever the rule may have been with reference to other agencies, there was no liability in the entire absence of fault.

The liability imposed on common carriers by the Nebraska law, which was upheld in the Zernecke case, is an extension to passengers of the liability imposed for freight on such carriers at common law, and rests on the same foundation. It is an insurer's obligation, imposed by the sovereign from which the carrier received its charter and its peculiar rights

and privileges. The power that confers the right to exist may impose such conditions as it chooses. This, in fact, is one of the grounds on which the decision in the Zernecke case was expressly rested, and is one on which it may safely rest. A second safe ground may be suggested, namely: the contractual obligation of all common carriers to their passengers to carry them safely. In the Nitroglycerin Cases, 82 U. S., 524, 537, 538; 21 L. ed., 206, 211, Justice Field said:

> "The gist of the action is the negligence of the defendants; unless that be established they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries from unavoidable accidents while engaged in a lawful business."

Again:

> "The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a *prima facie* case, which the carrier must overcome. His contract is shown, *prima facie* at least, to have been violated by the injury."

If the liability created by the Nebraska statute is a liability without fault, it is thus sustainable on two unimpeachable grounds: The undoubted power of the sovereign to impose restrictions upon a creature of its bounty, when that creature is a common carrier engaged in a business charged with a public interest, and the carrier's responsibility for the breach of its contract of safe carriage.

In passing, it is noteworthy in this connection that neither the Nebraska legislature nor the legislature of any other State or government has ever attempted to impose a similar liability, even upon common carriers, *for injuries to their employees.*

The liability created by the Missouri statute involved in the case of St. Louis & S. F. R. Co. *vs.* Mathews, 165 U. S., 1,

arose in connection with police regulation of common carriers. The wide distinction between the subject-matter of that law and that of the Arizona liability law is made clear by the following excerpt from the opinion of Mr. Justice Gray, 165 U. S., 1, at 26:

> "Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company which employs the instruments and creates the peril for its own profit rather than upon the owner of the property, *who has no control over or interest in those instruments.*" (Italics ours.)

The land owner has no interest in the railroad and no voice in the selection of its route. Its tracks are laid across his farm without his consent, against his will and over his protest. The employee, on the other hand, is equally responsible for the employment out of which inevitable accidents occur and he participates therein for his profit. New York Central R. Co. *vs.* White, 243 U. S., 188, at 205.

In connection with examples of liability without fault might be mentioned the statutes requiring railroad companies to fence their rights of way and upon their failure to

25

do so imposing upon them liability for stock killed. Such statutes have been upheld.

Missouri Pacific Ry. Co. *vs.* Humes, 115 U. S., 512.
Minneapolis & St. L. Ry. Co. *vs.* Beckwith, 129 U. S., 26.

In such cases the liability is for breach of duty validly imposed (Gulf, Colorado & S. F. Ry. Co. *vs.* Ellis, 165 U. S., 150, 158); in short, a liability for negligence. Black, in his work on Constitutional Law, 2nd ed., p. 351, speaking of similar laws, says:

> "But even such statutes cannot go beyond the imposition of such a penalty in cases where the fault lies at the door of the company. If the law attempts to make such companies liable for accidents which were not caused by negligence or disobedience of the law, but by the negligence of others or by uncontrollable causes, or does not give the company an opportunity to show these facts in its own defense, it is void."

Laws imposing liability for stock killed without requiring the right of way to be fenced, on the other hand, create a liability without fault. Such laws have been universally condemned.

Jensen *vs.* Union Pac. Ry. Co., 6 Utah, 253; 21 Pac., 994.
Ziegler *vs.* S. & N. Alabama Ry. Co., 58 Alabama, 594.
Birmingham Ry. Co. *vs.* Parsons, 13 So., 602.
Bielingbery *vs.* Montana Union Ry. Co. (Mont.), 20 Pac., 314.
Schenk *vs.* Union Pac. Ry. Co. (Wyo.), 40 Pac., 840.
Catril *vs.* Union Pac. Ry. Co. (Idaho), 21 Pac., 416.
Denver & R. G. R. Co. *vs.* Thompson (Colo.), 54 Pac., 402.

It is indeed significant that in the whole legal history of individual liability there has been such a consistent aversion

to the establishment of a liability without fault. It cannot be accounted for upon any other theory than that the principle itself is repugnant to the fundamental rights of liberty and property on which our institutions are founded. This rule of individual liability is one of the rules which the legislature is "prevented by constitutional limitations" from changing at its whim. Munn *vs.* Illinois, 94 U. S., at 1388.

It seems plain, therefore, that this law is a mere labor law, concerned only with the rights of individuals, and that as such it is clearly void.

The Arizona court, however, has sustained the measure upon the ground that it is a valid police enactment.

Inspiration Con. Cop. Co. *vs.* Mendez, 166 Pac., 278.
Superior & Pittsburg Copper Co. *vs.* Tomich, 165 Pac., 1188.
Superior & Pittsburg Copper Co. *vs.* Davidovich, 171 Pac., 127, 128.
Arizona Copper Co. *vs.* Burciaga, 177 Pac., 29.
Calumet & Arizona Mining Co. *vs.* Chambers, 176 Pac., 839.

The question remains, therefore, as to the correctness of this ruling.

3. The validity of the law as a law charged with a public interest.

The police power of the State is not without limitation. The bounds of its proper exercise are thus laid down by this court in Lawton *vs.* Steele, 152 U. S., 133, at 137:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature

> may never, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its definition as to what is a proper exercise of police powers is not final or conclusive, but is subject to the supervision of the courts."

When a law challenged under the Fourteenth Amendment is supported as a police measure, a two-fold judicial question arises. The first inquiry is whether the law deals with a subject-matter of public as distinguished from private concern; the second is whether the measure is reasonably necessary and appropriate to achieve the public end sought.

As Mr. Justice Pitney said in Mountain Timber Co. *vs.* Washington, 243 U. S., 219, at 238:

> "In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive."

In New York Central R. Co. *vs.* White, 243 U. S., 188, at 207, Mr. Justice Pitney said:

> "One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws *regulating* the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the

> category of police regulations. Sherlock *vs.* Alling, 93 U. S., 99, 103; 23 L. ed., 819, 820; Missouri P. R. Co. *vs.* Castle, 224 U. S., 541, 545; 56 L. ed., 875, 879; 32 Sup. Ct. Rep., 606." (Italics ours.)

The Arizona statute clearly deals with "the responsibility of employers for the injury or death of employees arising out of the employment." We apprehend, however, that not every law that deals with a proper subject-matter of police regulation is to be construed as a police measure or is to be held valid as such. In Lochner *vs.* New York, 198 U. S., 45, at 57, Mr. Justice Peckham said:

> "The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

The compensation systems considered by this court in New York Central R. Co. *vs.* White and the companion cases of Hawkins *vs.* Bleakly, 243 U. S., 210, and Mountain Timber Co. *vs.* Washington, 243 U. S., 219, *regulate* in a most thorough-going manner and in the interest of the public the whole subject-matter of compensation for industrial injury and death. The Arizona law has nothing in common with these laws. It does not *regulate* anything. As aptly remarked by Justice Ross in his dissent in this case: "Ours is not a system but a lawsuit." In dealing with the comprehensive New York Compensation Law, in the White case, Mr. Justice Pitney said:

> "And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of em-

> ployment, *and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State.*" (Italics ours.)
>
> New York Central R. Co. *vs.* White, 243 U. S., 188, at 206.

It seems to us that the Arizona law is in no sense a police measure. However, if we treat it as such simply because it deals with a subject which may be *regulated* in the interest of the public, it follows from what the court has said that it must be set aside as invalid unless it can be supported as an appropriate and proper exercise of the police power.

In order to judge of the appropriateness and the propriety, as well as the reasonableness of a police measure, it is necessary to know the specific public need which it is designed to meet or the precise public interest to be protected by it. The extent of the public interest must mark the extreme limit of permissible interference with the private rights of the parties.

The regulation of the relation of master and servant and of the compensation to be paid the servant in case of injury are conceivably matters of public concern, for the reason that if the burden of injury losses is to fall on the workman, the injured man and his dependents are certain, in a considerable number of instances, to be pauperized and to be driven into vice and crime. New York Central R. Co. *vs.* White, 243 U. S., 188, at 207. The public interest is two-fold. The public is concerned, in the first place, with the method by which compensation is secured, to the end that it shall be fairly estimated and promptly paid in all cases, without burdensome expenses and under such circumstances as to minimize friction between employer and employee. In the second place, the public is concerned with the amount of compensation so that the award shall be sufficient to protect the workman and his dependents against poverty and its attendant evils. This two-fold interest of the public must find appropriate expression in any law which can be sustained as a police regulation.

The matter of method becomes of public concern because of the collapse of the former system of liability. The common law of negligence furnishes no remedy in the cases of non-negligent injury, which are rapidly increasing in number annually, and from which results follow to those injured and the public which are quite as serious as in negligence cases. New York Central R. Co. *vs.* White, *supra*, at 205. New York Central R. Co. *vs.* Winfield, 244 U. S., 147, at 164, 165. Within its peculiar field the common law has broken down. Its administration is accompanied by a train of evils, including intolerable delays and burdensome expense for court costs and medical and legal fees, unscientific awards which are ofttimes utterly inadequate or grossly excessive, and much unnecessary bitterness and friction between those who should be friends.

The public, which must ultimately bear the burden of economic loss, is as vitally interested in the system by which compensation is estimated as it is in the scale of compensation. Its first concern is the eradication of the evils of litigation by insuring prompt payment of just compensation in all cases without burdensome expense or unnecessary friction. This can only be achieved by abolishing litigation and establishing a fair and just system of compensation. The prosecution of the lawsuit created by the Arizona law may be beset with fewer difficulties for the plaintiff than a suit for negligence, but it is subject to the same delays and the same expenses, and has the same potentialities for injustice and ill-feeling. Dissenting opinion of Ross, Justice, 166 Pac., 1183. So far as method is concerned, therefore, the common good is in nowise served by such a law.

In the second place, it is a matter of public concern that the award in case of injury or death shall be sufficient to prevent pauperism and its evils. It is of equal concern that the award shall not exceed what is reasonably necessary to protect the workman and his dependents in these respects.

Personal injuries usually involve physical pain and suffering and frequently result in deformity or disfigurement,

which may cause mental depression, anguish or humiliation. The physical hurt must be borne by the injured person; it cannot be shifted. New York Central R. Co. *vs.* White, 243 U. S., 188, at 203. Neither can the physical hurt be measured in terms of money. In the nature of the case, therefore, the public interest cannot extend to the point of requiring compensation for these elements. A law which authorized an award of damages for pain and suffering and kindred elements does not serve the public interest. It does, however, open wide the door for speculative verdicts, which bear no true relation to the public interest or to the pecuniary loss sustained by the injured man.

Neither can there be any suggestion of public concern in saddling upon the industry, or upon a particular employer, an unlimited liability to the estate of a deceased workman who has left no one dependent upon his labors, and therefore no one who has suffered pecuniary loss by his death.

The Arizona law, as shown by the decisions of the State Court already cited, authorizes an award of damages for physical pain and suffering, mental anguish and disfigurement, and by a provision, in no sense separable, subjects the employer in cases of injury resulting in death to liability in damages to the estate when no dependent relatives survive. Par. 3158.

This court, in the compensation cases, has expressly refrained from specifying the legal limits of permissible compensation under compensation laws. Nevertheless, the decisions make it clear that compensation must be based upon earnings, and cannot be allowed for speculative elements such as are included in the damages awarded under the Arizona law. It is equally manifest from these decisions that the rate of compensation must be certain or ascertainable on some definite basis and that it must be limited in amount.

These restrictions follow logically from the court's conception of the compensation system as disregarding the immediate cause of the accident and as treating the employment itself for which employer and employee are jointly responsible as the true cause of the injury. Under such a con-

ception there can be no question of damages, no question of liability, no question of punishment, but only the question of a just and reasonable sharing in the first instance of the loss inevitably flowing from a joint adventure from which both participants derive profit, the ultimate burden of which, reflected in the increased cost of the product, must finally be borne by the public.

The Arizona law is as inconsistent with this conception as is the common law. It relieves the employer of none of the evils of the common law, but saddles upon him a new lawsuit for damages according to common-law standards, where he has exercised the utmost human care, and, in addition, penalizes him 12 per cent of the jury's award if he fails on appeal.

It is our deliberate judgment that this law possesses none of the attributes of reasonableness that are requisite in a police measure, that it bears no true relation to the public interest, that it provides no just solution of this difficult problem, but that under the guise of the police power it seeks by arbitrary means irreconcilable with natural justice to take away from the employer in a lawful business his property and his rights and leaves him without adequate safeguard or defense. If a law like this can be sustained as fair and reasonable and as appropriate and necessary to protect the public interest, it would be difficult to conceive of lengths to which the legislature could not go.

In conclusion, therefore, we submit that whether this law be considered as a mere labor law confined to the declaration of a new liability between employer and employee, or whether it be viewed as an attempted exercise of governmental power, it must be condemned as unreasonable and arbitrary and contrary to the dictates of natural justice, and for those reasons in violation of the Fourteenth Amendment.

Respectfully submitted,

EDWARD W. RICE,
HARVEY M. FRIEND,
Attorneys for Plaintiff in Error.

INDEX

CASES CITED

In the Supreme Court of the United States

October Term, 1917

No. 819

INSPIRATION CONSOLIDATED COPPER COMPANY,

Plaintiff in Error,

vs.

CEFERINO MENDEZ,

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF ON BEHALF OF DEFENDANT IN ERROR

STATEMENT

This action was brought in the Superior Court, Gila County, Arizona, to recover damages for personal injuries in which a judgment was entered in favor of the defendant in error, the plaintiff in the trial court for the sum of Five thousand two hundred thirty-

seven and fifty-three one-hundredths ($5,237.53) Dollars.

An appeal was taken to the Supreme Court of the State of Arizona, and decision rendered and judgment affirmed the 2nd day of July, 1917, (folio 359.) The order of allowance of the writ of error was made November 19th, 1917, (folio 369,) and filed November 24th, 1917, (folio 371.) The action was founded upon the Employer's Liability Act, of the State of Arizona, Chapter VI, Title XIV, of the Revised Statutes of 1913.

The contention of the plaintiff in error is that the act is in violation of the fourteenth amendment of the United States Constitution.

The assignments of error, (folios 365, 366, and 367), of which there are six, set forth that the act in question, was unconstitutional, in that it created unlimited liability without fault, and that it deprived the plaintiff in error of its property without due process of law and denied to it the equal protection of the laws. These objections are all contained in the first assignment. The rest of the assignments are merely repetitions of the first and need not be further considered.

It will be noticed that the assignments are general in character and do not show upon what ground the plaintiff in error will contend that the act did violate the fourteenth amendment, except in that it created unlimited liability without fault. The specification of points to be relied upon, (folio 379), is equally general and indefinite, or even more so than the assignments of error in that the plaintiff in error seems to have abandoned in its specification the contention or claim that

the act was unconstitional because it created unlimited liability without fault.

It may be assumed from the pleadings and from the arguments and brief of the plaintiff in error in the court below that his contention will be that the act was unconstitutional because of its violating the term of the fourteenth amendment in that:

I. It created unlimited liability without fault.

II. It deprived the defendant and appellant of its property without due process of law, in that it provided for interest upon the judgment from the date of the filing of the complaint, if an appeal were taken, at the rate of twelve (12) per cent per annum;

III. That the employee or plaintiff in the trial court had the option of taking compensation under paragraph seven, Title fourteen, of the Revised Statutes of Arizona of 1913, commonly known as the Workman's Compulsory Compensation Act.

We shall discuss the above points in that order and as all of the assignments of error are a mere repetition of the first, except insofar as showing the plaintiff's in error procedure, pleadings or motions which it took to bring such questions before the trial court and Supreme Court, we shall not discuss such assignments separately.

ARGUMENT

I

THE ACT IN QUESTION DOES NOT CREATE

UNLIMITED LIABILITY NOR DOES IT CREATE LIABILITY WITHOUT FAULT NOR IS LIABILITY WITHOUT FAULT AS BETWEEN EMPLOYER AND EMPLOYEE AS CREATED BY SUCH A STATUTE IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Under the laws of the State of Arizona, an injured employee has three methods which he may pursue to obtain damages for personal injuries.

1. He may commence an action under the Employer's Liability Act as the defendant in error did in this case.

2. He may take advantage of the Common Law Liability of his employer and sue him under the Common Law.

3. He may take advantage of the provisions of the Workman's Compensation Act and recover partial damages, that is a fixed sum as set forth in the act, which damages are necessarily very much less than what he has actually sustained.

If he takes advantage of the Employer's Liability Act, in order to recover full damages, he must show that there has not been negligence on his part. (Sec. 3158). The damages which he will recover are his damages as found by a jury which, it must be conclusively presumed, will be his actual damages.

Under the Compensation Act the employer's negligence is not a defense to the action and he may recover half-time pay for the time that he is totally disabled or

in case of his death, his widow or other dependent may recover a similar compensation during widowhood or dependency, but in no event shall either recover more than four thousand ($4,000.00) dollars.

The last decade has seen a marked change in the statutes of the various states concerning damages to be recovered by an employee for personal injuries received in the course of his employment, and especially in those employment termed hazardous. The most important change and the most important act is the Workman's Compensation Act of New York, which was passed in December, 1913, and repassed again in January of 1914, in order to avoid any question concerning the constitutionality of the act, because of the amendment of the constitution which did not go into effect until January of that year.

The compensation act and the Employer's Liability Act of the State of Arizona, must be construed together to enable the employee to obtain the same or similar remuneration for personal injuries as is or may be obtained by an employee under the Workman's Compensation Act of New York.

The Compensation Act of Arizona is in no sense a compensation act. It's a mere figure of speech to call it such and the only redeeming feature about it is that it gives the employee the right to sue his employer under the liability act.

Under the Compensation Act the employer practically says to the employee; "We will engage in a joint adventure which is hazardous and likely to cause you personal injury. I will provide all the capital, manage

the business, purchase the machinery and equipment, and receive all the profits. You will do all the work for which I will pay you wages. In the event that you are injured, so as to result in your total incapacity to earn wages, I will pay you one half time pay until such time as I shall have paid you four thousand ($4,000.00) dollars. In the event that you are killed even though I may be guilty of negligence and cause your death, I will pay your wife, or other dependent a like sum, providing, your death results within six months from the time I injure you, but if you linger along for six months from the time of the injury, even though the act was wilful upon my part, I will pay your widow or dependent nothing. Nor will I pay you anything for the loss of a limb, disfigurement of any kind, or other injury, no difference how much damage it may cause you or how much pain and suffering you may sustain, except half-time pay until you are able to return to work. In the event that you should for instance, lose a leg or arm I will be entitled to give you a position as watchman or doorkeeper and only pay you such half timepay from the date of the injury until the time you are able to take up again such employment as I may offer you."

The Workman's Compensation Act of New York, must be distinguished from this so-called Compensation Act of Arizona. Under the New York Act an employee who is incapacitated for work for life, receives two thirds of his wages for the rest of his life. And under the insurance provision of that act such sum is guranteed to him by the state. He does not depend upon the future solvency of his employer nor must he follow his employer to other states to sue him. If he is killed, his widow receives her compensation for the rest of her life or until she re-marries. There is no limitation of four

thousand ($4,000.00) dollars, or any such sum as provided in our statute.

The injustice of the Arizona Compensation Act if construed as providing an exclusive remedy is apparent. If an employee receiving say, three thousand ($3,000.00) dollars a year, is killed through the negligence of his employer, his widow under this act would receive but four thousand ($4,000.00) dollars, a little more than he would earn in one year. If he is totally incapacitated for work he will receive the same sum, not in one payment so that he might invest it, and thus provide for some income for the rest of his life, but as half pay until he shall have received the four thousand ($4000.00) dollars. Then he must look to charity.

IF THE EMPLOYER'S LIABILITY ACT OF ARIZONA IS DECLARED UNCONSTITUTIONAL ON THE GROUND THAT IT CREATES A LIABILITY ON THE PART OF THE EMPLOYER WITHOUT HIS FAULT THE WORKMAN'S COMPENSATION ACT IS ALSO UNCONSTITUTIONAL AND WOULD LEAVE THE EMPLOYEE WITHOUT REDRESS FOR DAMAGES AND EVEN THOUGH THE COMPENSATION ACT WERE NOT UNCONSTITUTIONAL IT WOULD LEAVE THE EMPLOYEE PRACTICALLY REMEDILESS, AS THE COMPENSATION ACT PASSED SUBSEQUENT TO THE LIABILITY ACT WAS NOT INTENDED TO NOR DOES IT GIVE THE EMPLOYEE REASONABLE DAMAGES, BUT WAS INTENDED TO AND ONLY GIVES HIM SMALL DAMAGES WHEN THE ACT WAS DUE TO HIS SOLE NEGLIGENCE THEREBY PREVENTING RECOVERY UNDER THE LIABILITY ACT.

The Workman's Compensation Act of the State of New York was entirely different. It was intended to and does provide for full compensation in all cases and enjoins liability upon the employers whether the employer was or was not guilty of negligence or fault. It also enjoins upon him the duty of providing for insurance, state or otherwise, so that the employee will be as certain as the laws can possibly provide of receiving his compensation.

The plaintiff in error claims that the Arizona Liability Act provides for unlimited liability. This is not so. The liability is no more unlimited than it is under the compensation act of the state of New York. It is limited by the actual damages to be found by a court and jury, and if the verdict is excessive it may be set aside by the trial court, and if not by the trial court by the Appellate Court.

It is a direct reflection upon the courts of this state and the courts of the United States, to say that wrong and injustice will necessarily result from a trial in them or appeal taken to any of them and that justice may be obtained only by a trial before a legislature for damages before the accident occurred.

The judgment which the employee can obtain is limited to the damage sustained. This is probably the first Act of this nature under which the plaintiff in error has contended that it is unconstitutional because a jury must assess the damages.

So new was the theory that a legislature court fix the damages, or facts from which the damages might be fixed by mere computation, before the accident occurred,

that it was strongly argued and contended by the employers that the New York Act was unconstitutional upon that ground and that the employer was entitled to a trial by jury in all cases. (New York Central vs. White, 243 U. S. 188; Ives vs. South Buffalo Co., 201 N. Y. 271; Jenson vs. Southern Pac. Co. 215 N. Y. 514;)

The contention that the liability is unlimited is untenable. It is a mere subterfuge.

The Act does not provide for liability without fault. It only provides for liability for full damages sustained when *the employee was without fault.* It's a well known fact that there are few if any accidents which ever occur without the fault of someone. Under this Act the employee, to recover full damages, must show that he was without negligence. It necessarily follows that the employer was guilty of negligence or that some third party was at fault, perhaps a co-employee over whose employment and acts the injured employee had no control. It has long been the law of this land that a third person may recover damages for an injury caused by an employee when the employer himself was not guilty of negligence upon the ground that the employer was taking the profits from the enterprize; that the employee's acts were his acts and that the employee was his agent in doing the act. There is no theory of law which would not justify a legislature in giving an injured employee the same right of action against his employer that a third party injured in the same way might have.

It is not a new theory of our jurisprudence that a person may be liable in damages without any fault upon his part.

In the case of New York Central vs. White, (supra) this court held the Compensation Act of New York constitutional, which provided for just such liability even though the negligence of the employee himself may have been the sole cause of the accident.

Mr. Justice Pitney in the White case at page 198, says, "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." (Citing) Munn vs. Illinois 94, U. S. 113; Hurtado vs. California, 110 U. S., 516; Martyn vs. Pittsburgh and L. E. R. Co., 203 U. S. 284; Mondou vs. New York, and H. R. Co. 223, U. S. 1; Chicago, and A. R. Co., vs. Tranbarger 238, U. S. 67; and again on the same page he says:

> "Indeed liability may be imposed for the consquences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. St. Louis I. M. & S. R. Co., vs. Taylor, 210 U. S. 281; Texas & P. R. Co., vs. Rigsby, 241 U. S. 33;
>
> The fault may be that of the employer himself, or—most frequently—that of another for whose conduct he is made responsible according to the maxim respondeat superior. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the alter ego, while acting within the scope of his duties, be negligent,—in disobedience, it may be, of the employer's positive and specific command,—the employer is answerable for the con-

sequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's negligence is one of the natural and ordinary risk of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are Murray vs. South Carolina R. Co., (1841) 385 Am Dec. 268."

and on page (200)

"This court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee." Missouri P. R. Co., vs. Mackey, 127 U. S. 205, 208, 32 L. Ed., 107, 108 8 Sup. Ct. Rep. 1161;

Minneapolis & St. L. R. Co., vs. Herrick, 127 U. S. 210, 32 L. Ed., 109, 8 Sup. Ct. Rep. 1176; Minnesota Iron Co., vs. Kline, 199 U. S. 593, 598, 50 L. Ed., 332, 325, 26 Sup. Ct. Rep. 159, 19 A. M. Neg. Rep. 625; Tullis vs. Lake Erie & W. R. Co., 175 U. S. 348, 44 L. Ed., 192, 20 Sup. Ct. Rep. 136; Louisville & N. R. Co., vs. Melton 218 U. S. 36, 53, 54 L. Ed. 921, 928, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676; Chicago,

I. & R. L. Co., vs. Hacket, 228 U. S. 559, 57 L. Ed. 966, 33 Sup. Ct. Rep, 581; Wilmington Star Min. Co., vs. Fulton, 205 U. S. 60, 73, 51 L. Ed., 708, 715, 27 Sup. Ct. Rep. 412; Missouri P. R. Co., vs. Castle, 224 U. S. 541, 544, 56 L. Ed. 875, 878, 32 Sup. Ct. Rep. 606. A corresponding power on the part of Congress when legislating within its appropriate sphere, was sustained in second employers' liability cases (Mondou vs. New York, N. H. & H. R. Co.,) 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, and see El Paso & N. E. R. Co., vs. Gutierrez, 215 U. S. 87, 97, 54 L. Ed., 106, 111, 30 Sup. Ct. Rep. 21; Baltimore & O. R. Co., vs. Interstate Commerce Commission, 221 U. S. 612, 619, 55 L. Ed. 878, 883, 31 Sup. Ct. Rep. 621."

In rendering its decision in that case this court sustained a much more radical departure from the previous statutory acts, affecting an employers liability than is presented in the case at bar. In the White case the court held that it was not unconstitutional, to make an employer liable when he was without fault and when the employee's negligence was the sole cause of the injury and when the compensation recoverable was in excess of the damages sustained.

In the present case the only departure from the old common law liability before it had been altered beyond recognition by the product of judicial conception (New York Central R. Co., vs. White supra, page 199) is that the employer may be liable for all damages sustained, though no negligence is shown to have been committed by him or anyone else providing the employee is without

fault. It practically makes the act of every person except the employee himself and every factor causing the accident the agent of the employer.

This is the same liability under which every railroad or common carrier is placed as respects its passengers. No reason of law will prevent a legislature from placing the some liability upon an employer engaged in a hazardous enterprize.

So well settled is the principal of law that liability may be created without fault, when the injured party is not negligent, that it becomes idle to discuss this contention of the plaintiff in error further than to cite the following cases.

> "New York Central vs. White, (Supra) 243 U. S. 188; Sherlock vs. Alling, 93 U. S. 99; Missouri P. R. Co., vs. Castle 224 U. S. 541; St. Louis & S. T. R. Co., vs. Mathews, 165 U. S. 1; Chicago R. I. & P. R. Co., vs. Zernecke, 183 U. S. 582; Jesen vs. Southern Pac. Co., 215 N. Y. 514; Noble State Bank vs. Haskell, 219 U. S. 104; Chicago vs. Sturges 222 U. S. 313; McLean vs. Arkansas 211 U. S. 550; Louisville & N. R. Co., vs. Melton 218 U. S. 36; Atlantic Coast Line R. Co., vs. Riverside Mills, 219 U. S. 186; Darlington vs. N. Y. 164; Mondou vs. New York N. H. & H. R. Co., 223 U. S. 1;"

We have thus far been discussing the act in those cases in which the employee could obtain full damages which required that he should not be guilty of contributory negligence.

Section 3, 159 of the Liability Act, also provides that when the employee has been guilty of contributory negligence such fact shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such an employee.

When such negligence occurs the act becomes more similar to the workman's liability act of New York in that it does not prevent a recovery by the employee, but it is dissimilar in that it only allows him a partial recovery. In this it approaches the rules of law controling in admiralty in a tort action resulting in damage to property. Contributory negligence on the part of the libelant is not necessarily a bar to his recovery. The court will apportion the damages. "The Max Morris 137 U. S. 1; Smith vs. Shakopee, 103 Fed. 240; The Mystic 44 Fed. 398; Anderson vs The Ashebrooke, 44 Fed. 124, The Truro 31 Fed. 158; The Mabel Comeaux, 24 Fed. 490; The Wanderer 20 Fed. 140;

Courts of admiralty are not bound by the common and civil law rules governing contributory negligence but award or withhold damages according to priciples of equity and justice in the exercise of a sound discretion. Olson vs. Flavel 13, Sawy. (U. S.) 232; The Wanderer, supra; McCord vs. The Steamboat Tiber, 6 Biss (U. S.) 409. It has long been the rule of the civil law that contributory negligence on the part of plaintiff is a complete defense. This is not founded upon any constitutional right. If it were it would apply to such torts in admiralty as well.

Since a person sustaining damages to his property, though guilty of contibutory negligence, may obtain

redress in admiralty for such proportionate share of damages as is not caused by his own negligence there can be no reason, legal or otherwise, why a similar principal of law cannot and should not be extended to damages for personal injuries. If courts of admiralty can award or withhold property damages according to principals of equity and justice there is no reason why a legislature cannot make a similar law so that an injured employee may likewise recover damages according to equity and justice.

In the Mondou case (Supra) this court held that the Federal Employer's Liability Act (35 Stat. at L. 65, chap. 149, U. S. comp. Stat. Supp. 1909, P 1171) and the amendment of April 5th, 1910, which had a provision identical to the Arizona Act was constitutional. The provisions of that act so far as relating to contributory negligence is as follows:

> "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but th damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute

enacted for the safety of employees contributed to the injury or death of such employee."

In the Castle case (supra) this court passed upon the constitutionality of a similar statute of Nebraska and held it valid. Chief Justice White at page 544 says:

> "Obviously the same reason which justified a departure from the common law rule in respect to the negligence of a fellow servant also justify a similar departure in regard to the effect of contributory negligence, and the cases above cited in principal are therefor authoritative as to the lawfulness of the modification made by the 2d section of the statute under consideration of the rule of contributory negligence as applied to railway employees. The decision in the Mondou case sustaining the validity of the Federal employee's liability act, practically forecloses all question as to the authority possessed by the State of Nebraska by virture of its police power to enact in question, and to confine the benefits of such legislation to the employees of railroad companies;"

II

THE FACT THAT THE EMPLOYER'S LIABILITY ACT PROVIDES FOR INTEREST UPON THE JUDGMENT IN THE EVENT THAT AN APPEAL IS TAKEN DOES NOT VIOLATE ANY OF THE PROVISIONS OF THE UNITED STATES CONSTITUTION OR THE AMENDMENTS THERETO.

At the time the act in question was passed there

were no usury laws. Section 2774 of Title 37, of the Revised Statutes of Arizona 1901, in effect at that time is as follows:

> "In the absence of an agreement, in writing, signed by the debtor, interest shall be paid at the rate of six (6) per cent. per annum on money due on any bond, bill, promissory note or other instrument, in writing, on judgments, on money lent, on the sum due on accounts stated, on the sum due, from the time it is audited, from the territory, any county, city or village: provided, however, a different rate of interest, if agreed to in writing, signed by the payor, shall be paid. A judgment rendered on such agreement shall bear the rate of interest provided in the agreement, and it shall be so specified in the judgment."

Section 3505, Title 25, of the Revised Statute of Arizona, 1913, being chapter 55, law 1913, of the Second Special Session is as follows:

> "The interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for a year, unless a different rate is contracted in writing; provided, however, that a different rate of interest, not to exceed ten (10) per cent per annum, if agreed to in writing, signed by the debtor, shall be paid. A judgment rendered on such agreement shall bear the rate of interest provided in the agreement, and it shall be so specified in the judgment."

The latter part of Section 4916, of the Revised Statutes of Arizona, 1913, in reference to interest on taxes is as follows;

> "All taxes hereinafter contained in the "back tax book" herein described, shall bear interest from the time of the delinquency at the rate of ten (10) per cent per annum until paid. In computing interest under this act a fraction of a month shall be counted as a whole month."

Section 103, Title 1, Revised Statutes of Arizona, 1913 provides as follows;

> "If upon presentation to the State Treasurer of any warrant, he has not the funds in hand to pay the same, he shall endorse the day of its presentation upon the back of the warrant and whenever it is paid, interest, at the rate of five per cent per annum, in lawful money of the United States, shall be allowed from said day, and paid in addition to the principal thereof;"

It is to be seen that there are several rates of interest provided for by Statute. The ordinary contract can bear any rate of interest agreed upon not to exceed ten (10) per cent, and the judgment upon such an agreement shall bear interest at the rate of the agreement. Upon a warrant the interest payable is five (5) per cent. Upon delinquent taxes it is ten (10) per cent with the further provision that any part of a month shall be termed as a whole month in computing the interest.

It is further to be noted that up to and at the time

of enactment of the Employer's Liability Act, the parties could agree on any rate of interest and that such interest would be legal and a judgment upon such a contract would draw the same interest.

It is rather unreasonable for the plaintiff in error to contend that twelve (12) per cent interest on a judgment for personal injuries is taking property without due process of law. Several rates of interest have been established for different contracts. Judgments draw the same interest as the contract sued upon. It can hardly be termed an unreasonable rate when the banks generally charge ten (10) per cent and take the interest out in advance.

Nor is it taking property without due process of law. Nor is it unusual, nor unreasonable to make different rates of interest upon different classes of indebtedness.

In the case of The United Central Life Insurance Co., appellee vs. Chowning, appellant., 96 Texas 654, 24 L. A. R. 504., the court held valid article 2953 of the Revised Statute of Texas, which is as follows;

> "PENALTY FOR FAILURE TO PAY LOSS. In all cases where a loss occurs and the life or health insurance company, liable therefor shall fail to pay the same within the time specified in the policy, after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve (12) per cent damages on the amount of such loss, together with all

reasonable attorney's fees for the prosecution and collection of such loss."

In the Missouri Pacific R. Company, appellee vs. Mackey 127 U. S. 205, the court says;

"And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

"Such legislation is not obnoxious to the last clause of the fourteenth (14) amendment, if all persons subject to it are treated alike, under similar ciscumstances and conditions in respect both of the privileges conferred and the libilities imposed."

The same principle of law has been held valid in the following cases: The Pembina Con. Silver Mine vs. Pennsylvania, 125 U. S. 18; Pacific Exp. Co. vs. Seibert, 142 U. S. 353; Charlotte Co., & A. R. Co., vs. Gibbes 143 U. S. 391; New York vs. Squire 145 U. S. 175; Fraternal Mystic Circle vs. Snyder 227 U. S. 497: Alliance Co-operative Ins., Co. vs. Corbett, 69 Kan. 564, 77 Pac. 108; Aldrison T. & S. F. R. Co., vs. Mathews, 174 U. S. 96: Fidelity Mut. Life Association vs. Mettler 185 U. S. 308; Iowa L. Ins. Co., vs. Lewis 187 U. S. 335; Farmers & M. Ins. Co., vs. Pobney 189 U. S. 301; Seabord Air Line R. Co., vs. Seegors 207, U. S. 73; Yazoo & M. Valley R. Co., vs Jackson & Co., 226 U. S. 217;

It is not unusual for the several states to establish various rates of interest for the different obligations which give the successful plaintiff an additional amount to that actually due.

In foreclosure suits generally the complainants are entitled to tax and recover as cost upon the sale of the property an allowance fixed by statute in addition to the principal sum due.

Par. II, of rule 23 of the Rules of Practice of this court provide that in certain cases an additional amount of ten (10) per cent of the judgment in addition to interest shall be awarded to the defendant in error upon the affirmance of the judgment.

The contention of the plaintiff in error that the interest provision of twelve (12) per cent makes the act unconstitutional is without merit.

III.

THE OPTION GIVEN THE EMPLOYEE OF ACCEPTING COMPENSATION UNDER THE WORKMAN'S COMPENSATION ACT OR RECOVERING UNDER THE EMPLOYER'S LIABILITY ACT DOES NOT AFFECT THE CONSTITUTIONITY OF THE LATTER ACT.

If the giving of such an option is unconstitutional it is the compensation act affected and not the Employer's Liability Act under which this action was brought. This act was passed at the general session of the legislation and was in full force and effect prior to the enactment of the Compensation Act. Its con-

stitutionality must be tested at the time of its enactment, and a subsequent law giving the employee an option of taking advantage of such subsequent or previous law could affect only the constitutionality of the latter act.

The Compensation Act of New York, which this Hon. Court held constitutional in the White case, Supra, also gave the injured employee an option of proceeding under that act in certain cases or to commence an action for damages in which contributory negeligence on the part of the employee or co-employee, or assumption of risk would not be a defense.

In the case of Cunningham vs. Northwestern Improvement Company, (supra) the Supreme Court of Montana, in construing the Compensation Act of that state (See chapter 67. laws 1909) which gave the injured employee the right to take compensation under the act and also reserve to him the right of a common law action, held that this option given to the employee did not in any way affect the constitutionality of the act. The court says, 119 Pac. Rep. 566, "We have decided that the fact that actions at law are not abolished by the act is not, in itself, a sufficient reason for declaring the statute unconstitutional."

The rule of law giving the injured party in any action arising out of fraud the option of bringing an action for the return of the property or suing for damages has never been questioned.

When personal property is tortiously taken and converted the owner may waive the tort and sue the wrong doer in assumpsit for its value. Terry vs. Munger 121 N. Y. 161, 24 N. E. 272.

Even when the property taken has not been converted the owner may have a similar right. Terry vs. Munger Supra. Wiler vs. Kershner, 109 Pa. St. 219; Robertson vs. Dunn 87, N. C. 191; Knapp vs. Hobbs, 50 N. H. 476; Grinnelle vs. Anderson 122 Mich. 533; 81 N. W. 329;

IN CONCLUSION

The judgment should be affirmed and the writ of error dismissed.

Respectfully submitted,

HUGH M. FOSTER,
GRAHAM FOSTER,
GEORGE F. SENNER,

Attorneys for Defendant in Error.
Globe, Arizona